Supreme Court, U.S.
FILED

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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

IDA NELKIN PANZER AND NEWTON B. SCHWARTZ,
Petitioners,

v.

BEA NELKIN, JOELLEN SNOW AND JOHN HUTCHINSON,
Respondents.

Petition For A Writ of Certiorari To the Court of Appeals For The First Judicial District of Texas at Houston

PETITION FOR WRIT OF CERTIORARI

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139 pp

QUESTIONS PRESENTED

1. Whether the Trial Judge's "standard" instructions and comments to the jury panel before *voir dire* stating that "....Jury trials date clear back to the time of Christ...." and his allowance of the Respondent to introduce over objection, Petitioner's Jewish religion before the jury panel was state action in violation of the Petitioner's First Amendment Rights?

2. Whether after Petitioners obtained rulings excluding such deliberate reference to Petitioners being Jewish before captive jurors required to appear for jury duty and then after Respondent violated those rulings, the Trial Courts denial of Petitioners' Motion for a Mistrial was a violation of the "Establishment" and/or "Exercise" provisions of the First Amendment?

3. Whether striking the Petitioners' pleadings for alleged trial abuses was clearly erroneous, where the decision was based solely or principally upon Respondents' unsupported "ghostwritten" Findings of Fact, Conclusions of Law, Orders and Judgments which were adopted verbatim by the Court, was a deprivation of petitioners' Fourteenth Amendment substantive and procedural due process rights?

4. Whether an imposition of a civil "Death Penalty" striking Petitioners' pleadings based solely or principally upon admittedly "ghostwritten" Findings and Conclusions is such state action as this Court should review and rectify to afford due process of law?

5. Whether Respondents' challenged preemptory striking of minority prospective jurors without sufficient race neutral explanation after Petitioners made a *prima facie* case of racial discrimination violated the jurors "equal protection" rights and Petitioner's right to a fair and impartial jury.

LIST OF PARTIES

The parties to the proceedings below are Petitioners, June 25, 1996 Ida Nelkin Panzer, Plaintiff and Appellant below, and Newton B. Schwartz, Appellant below, and Bea Nelkin, Joellen Snow, individually and as guardian of the person and estate of Gladys Nelkin, *Non Compos Mentis*, Defendants and Appellee below, and John Hutchinson, Appellee below.

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OPINIONS BELOW

Petitioners, Ida Nelkin Panzer and Newton B. Schwartz, respectfully pray that a Writ of Certiorari issue to review the Opinion and Judgment of the Texas First Court of Appeals, entered in the above entitled proceeding on December 1, 1994. This opinion is unreported and a copy is reprinted at pages Appendix A-4 (hereafter A). The Texas Supreme Court denied Petitioners' Application for Writ of Error on February 9, 1996 (A-56) and denied Petitioners' Motion for Rehearing of the Application for the Writ of Error on April 4, 1996. (A-58)

JURISDICTION

The Texas First Court of Appeals issued its opinion on December 1, 1994. The Texas Supreme Court denied Petitioners' Applications for Writ of Error on February 9, 1996 and denied a Motion for Rehearing on April 4, 1996.

The jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances."

Section One of the Fourteenth Amendment provides:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This case originated with the appointment of Joellen Snow (Snow), Respondent, Guardian for the person and estate of Gladys Nelkin, *Non Compos Mentis* (*n.c.m.*), Mother of Ida Nelkin Panzer (Petitioner) in July 1990, over competing applicants, Bea Nelkin and Petitioner, by later agreement of the parties. The case was filed in the Probate Court #1 with the Honorable Judge John Hutchinson presiding. He recused himself after a motion and Presiding Judge William McCulloch was appointed his successor in November 1990. Upon Mrs. Nelkin's death in November 1990, Petitioner moved to close the estate by filing Mrs. Nelkin's Last Will and Testament, in another probate court. This motion was denied. Respondent Snow is still acting in her capacity as guardian today, more than four and half years after Mrs. Nelkin's death.

Discovery then commenced in this case. By August 1991, competing requests for sanctions during discovery resulted in the imposition of sanctions upon Petitioners.

The following are material to this appeal:

1. An abortive jury voir dire on August 27-28, 1991 in which the following occurred and the Constitutional questions arose regarding the violation of First Amendment Rights after Petitioner unsuccessfully sought the recusal of Judge McCulloch [Statement of Facts (hereafter SF) for 8/27-28/91 pp. 72-73, A-60]

a. Judge McCulloch granted a Pretrial Motion in Limine instructing counsel not to make reference to Petitioner's being Jewish before the jury during voir dire. (SF for 8/15-26/91 pp. 91-95, A-61)

b. Judge McCulloch without prior notice to Counsel, read this standard jury statement and still today, gives it in Probate Court #4; "Good Morning. I am Judge Bill McCulloch, Judge of Probate Court No.4 of Harris County. Today we are here to try a lawsuit involving an Estate. The parties have requested a jury trial and that is why you are here. The right to a trial by jury of impartial peers is inherent in our system of justice. It is my understanding that jury trials date clear back to the time of Christ...." (Addendum to SF for 8/27/91 pp. 1, A-65)

c. Respondent, through her counsel, then stated shortly after the Courts' remarks in his *voir dire* that Mrs. Nelkin was in "the Seven Acres Jewish Geriatric Center." (SF for 8/27-29/91 pp. 112, A-66) This was contrary to both the Petitioners' First Amendment Rights and the ruling on the Motion in Limine. Petitioners' timely Motion for Mistrial, based on these two violations was denied [Transcript from the Probate Court (hereafter TR) pp. 1397, A-

84 & "SF" 113, 8/27-28/91, A-66]. Later the Respondents' Motion for Mistrial on other grounds was granted. (TR pp. 1430, A-95)

2. Respondents Counsel admittedly "ghostwrote" Findings of Fact, Conclusions of Law, Orders and Judgments. These were all adopted, signed and entered verbatim by the Trial Judge McCulloch in all of the Findings and Conclusions. Based solely, if not principally, upon these Findings and Conclusions, all prepared by Respondent, the Petitioners' pleadings were struck, and a civil "death penalty" was entered. (TR pp. 1682-1696, A-39) The "death penalty" was based on these "ghostwritings" that included prejudicial statements regarding alleged violations by Petitioner's counsel. The Petitioners timely and repeatedly objected to Respondents ghostwriting the Court's findings and conclusions. (TR pp.1476-1479, A-99) The Court then went on to hear, without opposition, Respondent's "proof" of attorney's fees and expenses in excess of $200,000. This award largely depleted Petitioner Panzer's inheritance under her mother's will.

3. Respondents then struck 2 of 3 minorities that were in the first 20 members of the jury panel (TR pp. 1419, A-89). Petitioner was also able to show that Respondents' Counsel had been a member of a law firm that in 1977 split because of the non-hiring of a black member. Respondents' Counsel stayed with the members of the firm that had been opposed to the hiring of the black attorney. Respondent stated that this refusal to hire the African American Lawyer was not the reason behind the break up of the firm. However Respondent then stayed with the all white members for four more years, while four partners, left the firm immediately and hired the African American lawyer. These two facts were *prima facie* evidence of racial discrimination so that the burden of proof shifted to the Respondent to show that the

jury strikes were racially unbiased. (SF for 8/27-29/91 pp. 330-349, A-68)

Respondent then stated that his motives were unbiased. He gave as evidence his two years as a clerk to the Late Honorable Homer Thornberry, U.S. Circuit Judge for the Fifth Circuit and District Judge in Texas. Judge Thornberry was nominated by President Johnson to replace Justice Fortas upon the later's ascension as Chief Justice of this Court. Judge Thornberry's nomination died along with Justice Fortas's elevation. He stated that he helped in writing opinions in the civil rights cases that were decided in 1964-65 by the Fifth Circuit Court of Appeals is evidence that he was not a racist, and that his strikes were not motivated by race. (SF for 8/27-29/91 pp. 336-349, A-72) The Petitioners' objection to the strikes was overruled, and the two minority jurors were excluded. (SF for 8/27-29/91 pp. 350, A-82)

Thereafter appeals followed in a timely manner in which each of these Constitutional Questions were raised. The Trial Court's actions including a restatement of the "ghostwritten" Findings and Conclusions were upheld by the First Court of Appeals (an intermediate appellate court in Texas, see unreported decision, appendix page A-4) and on February 9, 1996, after having been pending for 364 days, Petitioners' Application for Writ of Error to the Texas Supreme Court was denied. On April 4, 1996, Petitioners' application for Rehearing on their Application Writ of Error was also denied. Petitioners' Federal questions were thus made at the earliest opportunity at the Trial Court, and were renewed at the Court of Appeals and the Texas Supreme Court. At all levels of the proceedings the questions raised, were rejected.

This Petition for Writ of Certiorari timely followed.

REASONS FOR GRANTING THE WRIT

I. THE TRIAL JUDGE'S "STANDARD" ONGOING INSTRUCTIONS IMPROPERLY INJECTED RELIGION AND PERMITTED RESPONDENT TO INTRODUCE OVER OBJECTION PETITIONERS' RELIGION THEREBY VIOLATING PETITIONERS' FIRST AMENDMENT RIGHTS WITH REGARD TO THE SEPARATION OF CHURCH AND STATE, IMPOSED ON THE STATES THROUGH THE FOURTEENTH AMENDMENT.

II. THE VIOLATION OF RULINGS THAT EXCLUDED DELIBERATE REFERENCE TO PETITIONER BEING JEWISH BEFORE CAPTIVE JURORS REQUIRED TO APPEAR FOR STATE COURT DUTY AND THEN AFTER THAT VIOLATION THE DENIAL OF PETITIONERS' MOTION FOR A MISTRIAL WAS A VIOLATION OF THE "ESTABLISHMENT" AND OR "EXERCISE" PROVISION OF THE FIRST AMENDMENT.

The three hundred year old wall separating Church and State in the United States has been breached in this case by the Trial Court's standard instructions to this jury and all other Juries in Probate Court #4 that: "... It is my understanding that Jury trials date clear back to the time of Christ...." In this particular case it is an egregious violation of the Petitioners' First Amendment rights: (1) because it was done knowing that Petitioners are Jewish and sought to prevent this fact from being brought out before the assembled jury panel who were required under penalties of fines and

imprisonment from refusing to appear; (2) because it was done in a state courthouse which is a sanctuary from imposition or subjection to religious views by anyone, much less by a state official, Judge McCulloch. (3) This standard instruction is still given in every case that is heard in Probate #4. It violates not only Petitioners' rights but every American citizens' First Amendment rights so long as the instructions continue to be given.

For more than half a century since this Court's landmark decision in *West Virginia State Bd. of Education v. Barnett*, 319 U.S. 624 (1943), state compulsion of religious views has been barred. This Court cited the First and Fourteenth Amendment as the bases for it's 8-1 ruling.

Probate Court Judge McCulloch's actions: (1) The instruction that "Jury trials date back to the time of Christ" as being a precursor to our present day jury system and; (2) The allowing of Respondent's counsel to make reference to the Seven Acres Jewish Geriatric Center in violation of the Motion in Limine, are state actions in violation of this Court's decision in *West Virginia State Bd. of Education*, *id.* and *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948). and their genre. Such state action is violative of the First Amendment to the United States Constitution which was and is imposed on the States through the Fourteenth Amendment.

These actions were equally violative of the First Amendment's explicit separation of Church and State. It was this inclusion of the "exercise" and espousal of religion within a State controlled facility to which prospective jurors were required to appear upon civil and criminal penalties that deprived Petitioners and the jury of their First Amendment constitutional rights. The subsequent granting of Respondents' Motion for a Mistrial on wholly unrelated

grounds does not render the matter moot or irrelevant, contrary, to the Court of Appeal's opinion. It is not moot for the reason that its use in Petitioners' case and continuing use today as standard form instructions continues to violate all citizens', not just Petitioners', First Amendment Rights. Just as a creche (depicting the nativity scene of the birth of Jesus surrounded by Mary, Joseph, and the Three Wise Men) or a menorah or any other symbol of any religion in or on any state or federal governmental property are violative of First Amendment rights. So here is the repeated use of the symbolism, shibboleth or talisman, or in today's language, a buzzword for Christianity, or any other religion's espousal by the State, prohibited.

This Court has previously prohibited the exercise of First Amendment rights even by private persons from inside public buildings. See *e.g. Cox v. Louisiana*, 379 U.S. 559, 13 L.Ed.2d 487, 85 S.Ct. 476, *rehearing denied,* 380 U.S. 926, 13 L.Ed.2d 814, 85 S.Ct. 879 (1965), *Cameron v. Johnson*, 390 U.S. 611, 20 L.Ed.2d 182, 88 S.Ct. 1335, *rehearing denied*, 391 U.S. 971, 20 L.Ed.2d 887, 88 S.Ct. 2029 (1968). This Court has even found that your own building and grounds are not transformed into public forum property accessible for First Amendment exercise, *United States v. Grace*, 461 U.S. 171, 75 L.Ed.2d 736, 103 S.Ct. 1702 (1983) later proceeding 246 App D.C. 167, 763 F.2d 457 (disagreed with United States v. Yoffe (CA1 Mass) 775 F.2d 447) and cert denied (U.S.) 88 L.Ed.2d 565, 106 S.Ct. 583.

A State (or any) Courthouse is not the place for imposition of the religious views of State officers, including Judges, however well intended or seemingly innocuous, by the majority religion preached. To subject Petitioners and the assembled captive jurors to such religious indoctrination is contrary to over three centuries of religious freedom

teachings in this Country. These teachings precede the Declaration of Independence in 1776, the adoption of the Constitution in 1789 and the ratification of the First Ten Amendments thereto in 1789-1791. *e.g.* Since Roger Williams founding of Rhode Island, or Plymouth in 1620 or Jamestown dating back to 1607.

The egregious combination of the Trial Court's "standard instructions" to the Jury Panel and Respondents' counsel's action condemned here, is not to be compared with privileged and clearly protected First Amendment rights in private non-compelled circumstances, where a person can voluntarily choose whether or not to attend, be it in a church or private building. Illustrative of this is Justice Scalia's recent speech at the First Baptist Church in downtown Jackson, Mississippi on April 9, 1996 as reported in the Houston Chronicle and elsewhere, by the Washington Post's syndicated correspondent, Joan Biskupic.[1] His speech took

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[1] "...Christians must proclaim their belief in miracles and ignore the scorn of the 'worldly wise"...'the modern world dismisses Christians as fools for holding to their traditional beliefs'..."we are fools for Christ's sake" 'Scalia told the audience of more than 650 people, which responded to him with a standing ovation' she reported.

"We must pray for the courage to endure the scorn of the sophisticated world"..."The wise do not believe in the resurrection of the dead. It is really absurd"..."So everything from the Easter morning to the Ascension had to be made up by the groveling enthusiasts as part of their plan to get themselves martyred" She attributed these comments to Justice Scalia, since no complete transcript was available or furnished by this Court, she explained.

'Scalia has vigorously advocated a lower wall of separation between church and state. He favors clergy-led prayer at graduations and has voted for public school funding of religiously affiliated programs' She stated.

place at a private gathering, where people chose to attend and no person was compelled to listen to his remarks by either federal or state action, unlike the present case.

The denial of First Amendment Rights to private citizens inside such public buildings precludes State Officers from the same activities, particularly relating to the establishment or exercise of religious views and espousing any particular religion as Respondents' Counsel and the Trial Court did here.

It is sophistry to say that the mention of "...Jury trials date clear back to the time of Christ" is not espousal of Christianity or any other religion, but only history or historical fact. There is only one trial that "date(s) back to the time of Christ" that of Christ himself. Were it not for Cecil B. DeMille having made the movie *Barabbas* in the 1950's (known only to the older fourth of the present U.S. Population) or those reading Matthew 27:16-21, no one would know of any trial "dat(ing) back to the time of Christ" except for probably one, the most notable event of the past two millennia, that of the trial, crucifixion, death and

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'Scalia noted that the word "cretin" was derived from the French word for "Christian." "to be honest about it, that is the view of Christians taken by modern society".... "Surely those who adhere to all or most of these traditional Christian beliefs are to be regarded as simple-minded"...."the worldly wise"..."they just will not have anything to do with miracles." She quoted.

'Scalia referred to a story published in the Washington Post in 1992 about a priest who reported bleeding wounds resembling those Christ suffered during the crucifixation.' "The Washington Post sends out a team of reporters who produce a strangely ambivalent story about this phenomenon"...."The thought occurred to me: why wasn't that church absolutely packed with nonbelievers?"..."Why weren't the Washington Post reporters, if they couldn't explain the phenomenon, absolute converts?..." She reported.

resurrection of Jesus Christ. Right or wrong, for most of the time from past to the present in Texas and general U.S. public's mind, Jews more so than the Roman Rulers of Judea were and are blamed for the death of Christ.

Thus the synergy of the two repeated remarks, "Jury trials date back to the time of Christ," and Ms. Nelkin being "in Seven Acres Jewish Geriatric Center," coupled together became a buzzword for jurors, who were required to appear, to judge Petitioners' case, and caused fundamental prejudice to the petitioner and impermissible imposition of religious views upon the jury panel assembled, it continues today.

III. THE STRIKING OF PETITIONER'S PLEADINGS FOR ALLEGED TRIAL ABUSE BASED SOLELY OR PRINCIPALLY UPON UNSUPPORTED GHOSTWRITTEN FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDERS AND JUDGMENT WAS A DEPRIVATION OF THE PETITIONERS' FOURTEENTH AMENDMENT RIGHTS OF SUBSTANTIVE AND PROCEDURAL DUE PROCESS.

IV. THE IMPOSITION OF A CIVIL "DEATH PENALTY" STRIKING PETITIONERS' PLEADINGS BASED SOLELY OR PRINCIPALLY UPON ADMITTEDLY "GHOSTWRITTEN" FINDINGS AND CONCLUSIONS IS STATE ACTION AND UNIFORMLY DENIES DUE PROCESS OF LAW.

A second and equal reason for the allowance of the writ is the blatant acknowledged issuance by the Probate Court of Judicial Findings of Fact, Conclusions of Law, Orders and Judgments, that were all ghostwritten by the Respondent. No invitations were extended by the Trial

Judge to have both parties prepare such Findings and Conclusions prior to their issuance. There was no prior announcement made by the Court issuing a decree that the Respondents' Counsel was to ghostwrite the Findings and Conclusions. Only after the Findings and Conclusions were signed "as prepared by Respondent's Counsel" did the Petitioner become aware that they were prepared by the Respondents' Counsel. These Findings and Conclusions included clearly erroneous findings and conclusions that led to the striking of the Petitioners' pleadings. Therefore it deprived the Petitioners of the very Jury trial that they had requested and paid the required State Court Jury Fee for.

While the question had not been raised in the past 75 years in Texas, there is ancient Texas case law which sanctions the use of ghostwritten findings of fact, conclusions of law, orders and rulings[2]. This Court and the Federal Courts of Appeal have noted that such actions are to be criticized if not stricken. This case is unlike this Court's decision in *Anderson v. Bessemer City*, 470 U.S. 564 (1984), where the ghostwritten findings were not overturned because the findings were not clearly erroneous. Procedurally they are deficient here in depriving Petitioner Panzer due process of law. In the case at bar the findings were clearly erroneous and unsupported. The Probate Court only rubber-stamped its' approval.

There are three reasons distinguishing the case at bar from *Anderson*, *id*: (1) The Judge in the present case adopted, signed and entered the Findings of Fact, Conclusions of Law, Orders, and Judgment as they were prepared always verbatim by the Respondents, no substantive

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[2] *Berkman v. D.M. Oberman Mfg. Co.*, 230 S.W. 838 (Tex.Civ.App.--Austin, 1921, writ dism'd) and *First Nat'l Bank v. Skidmore*, 30 S.W. 564 (Tex.Civ.App. 1895, no writ)

changes were ever made; (2) The Petitioners' here were not given an opportunity to review, much less object to the Findings and Conclusions prior to their entry. Only after the entry of the Findings and Conclusions did the Petitioners even become aware of the problem and timely objected. No ruling was ever made with regard to the Petitioners' objections; (3) The erroneous Findings and Conclusions were the basis for the Trial Court striking all of the Petitioners' pleadings. This resulted in a default judgment being granted for the Respondents on all issues and on all sums prayed for, there was no opposition permitted to contest them. These actions caused the Petitioners' to lose all standing to appear and contest all findings thereafter.

The important rules stated by this Court in *Anderson v. Bessemer City* were violated in the case at bar:

> "We, too, have criticized courts for their verbatim adoption of findings of fact prepared by prevailing parties, particularly when those findings have taken the form of conclusory statements unsupported by citation to the record. See, *e.g. United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-657 (1964); *United States v. Marine Bancorporation*, 418 U.S. 602, 615, n.13 (1974). We are also aware of the potential for overreaching and exaggeration on the part of attorneys preparing findings of fact when they have already been informed that the judge has decided in their favor. See. Wright, The Nonjury Trial-Preparing Findings of Fact, Conclusions of Law, and Opinions, Seminars for Newly Appointed United States District Judges 159, 166 (1962)."

In this case the practice is the more egregious because the Court did not first announce its decision, and then ask for Findings and Conclusions, but "took the matters under advisement" each time. Then there appeared, the signed ghostwritten Findings, Conclusions, Orders and Judgments all containing the tell-tale imprimatur "JSH", Respondents' counsel's, Joseph S. Horrigan's, initials, and the number in sequence 187-189 etc. (TR 1682-1696, A-39, TR 1697-1698, A-54, TR 1699-1705). The foregoing and other longstanding recognized vices in such procedures are all inherent in this case, as can be seen by the resulting civil death penalty against Petitioners that was prepared solely by respondents' counsel and based on Respondents' Findings and Conclusions.

There are many cases both preceding and following *Anderson, supra*, where the Courts have condemned the use of ghostwritten findings of fact. This Court should grant this petition and reaffirm *Anderson* and the reasoning used *In Re Colony Square*, 819 F.2d 272 (11th Cir. 1987) where the Eleventh Circuit Court of Appeals stated that the Federal Courts of Appeal, "repeatedly condemned the ghostwriting of judicial orders by litigants", *In Re Colony Square*, 819 F.2d at 274 and that Court went on to state:

> "This Circuit and other appellate courts have repeatedly condemned the ghostwriting of judicial orders by litigants. (citations omitted) The cases admonishing trial courts for the verbatim adoption of proposed orders drafted by litigants are legion. (citations omitted) The bankruptcy judge here compounded this error by failing to give Colony an opportunity to respond to Prudential's proposed orders. (citations and footnotes omitted)

> The dangers inherent in litigants ghostwriting opinions are readily apparent. When an interested party is permitted to draft a judicial order without response by or notice to the opposing side, the temptation to overreach and exaggerate is overwhelming. See *Anderson v. City of Bessemer City, N.C.*, 105 S.Ct. at 1511; (Foot note omitted) . (Citation and Foot note omitted) The proposed order or opinion serves as an additional opportunity for a party to brief and argue its case and thus is unfair to the party not accorded an opportunity to respond. (Citation and Foot note omitted) The quality of judicial decision making suffers when a judge delegates the drafting of orders to a party; the writing process requires a judge to wrestle with the difficult issues before him and thereby leads to stronger, sounder judicial rulings. (citations and footnotes omitted) In addition, the *ex parte* communications occasioned by this practice create an obvious potential for abuse." (citations and Footnote omitted) *In Re Colony Square*, 819 F.2d at 274-76.

Unless stopped by imposing the requirements of the Fourteenth Amendment Due Process of Law clause, both procedural and substantive, such legal travesties as occurred here will continue to be repeated, even nationwide. The Separation of judging and advocacy become first blurred and then unite as counsel will usurp the role of the judiciary by writing the Court's Findings of Fact, Conclusions of Law and even Final Orders and the Final Judgement, as all indisputably occurred here. This is no more to be permitted than the Respondents' Counsel writing this Court's or the intermediate and lower Courts' opinions or drafts. It is only

a difference in degree between that draconian dystopia and what has happened here. This is far easier to do today than it was in the eras of the quill pen, or the manual typewriter or even the electric typewriter, now that we have been ushered into the computer age, with the word processor, the lap top computer, the internet and the world wide web obviating the necessity for law books. It is thus especially important now in this case because this action was a denial of Petitioners' Due Process of Law rights under the Fourteenth Amendment. This state action resulted in the striking of Petitioners' Pleadings and the civil death penalty.

V. RESPONDENTS CHALLENGED PEREMPTORY STRIKING OF MINORITY PROSPECTIVE JURORS WITHOUT RACE NEUTRAL EXPLANATION WAS A VIOLATION OF THE JUROR'S EQUAL PROTECTION RIGHTS UNDER THE FOURTEENTH AMENDMENT AND THE PETITIONER'S RIGHT TO A FAIR AND IMPARTIAL TRIAL.

Respondents struck 2 out of the 3 minorities on the jury panel. Respondents' counsel struck jurors #2, an African American (TR pp. 1419, A-90) and juror #19 (TR pp. 1419, A-90) a Hispanic as two of their strikes.

In going forward with proof of a violation of both the jurors equal protection rights and petitioners rights to a fair trial and an impartial jury, Petitioner showed that Respondents' counsel was a member of a law firm that in 1977 split over the issue of hiring an African American attorney. This refusal to hire him by some members of the firm resulted in the defection of those members who approved of hiring the African American and who in fact hired him, as an attorney after the split. While Respondent denied that this was the reason or motive for the split, he

admitted remaining with the partners and associates who refused to hire the African American lawyer for another four year from 1977 to 1981. This coupled with his striking was sufficient evidence to establish a *prima facie* case of racial discrimination to shift the burden of requiring Respondent to show a race neutral explanation for striking the minority jurors. He attempted to defend his actions by stating that he had been a clerk to the late Hon. Homer Thornberry for two years. He stated that he helped write decisions on the civil rights cases that were decided in 1964-65 by the Fifth Circuit Court of Appeals. His purported attempt to try to explain failed, here. This action violated the jurors equal protection rights under Amendments 5 and 14 to the United States Constitution and Petitioners' rights to a fair and impartial jury of her peers. See *Edmonson v. Leesville Concrete Company, Inc.*, 111 S.Ct. 2077 (1991).

CONCLUSIONS

For the reasons stated herein, a Writ of Certiorari should be granted in this case and the judgment of the Texas 1st Court of Appeals should be reversed and the case should be remanded to the Trial Court for a new trial, consistent with the foregoing.

Respectfully Submitted

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APPENDIX A

COURT OF APPEALS
FIRST DISTRICT OF TEXAS
COPY OF JUDGMENT

IDA NELKIN PANZER AND NEWTON B. SCHWARTZ, APPELLANTS	Appeal from Probate Court Number One of Harris County, Texas. (Tr. Ct. No.237,361).
NO. 01-90-01050-CV	
V.	
BEA NELKIN, JOELLEN SNOW, AND JOHN HUTCHISON, APPELLEES	Opinion delivered by Justice Wilson, Justices Duggan and Mirabal also sitting.

The cause heard today by the Court is an appeal from the judgment rendered and entered by the court below on September 24, 1990. After hearing the cause on the record of the court below and inspecting the same, it is the opinion of this Court that there was no error in the judgment. It is therefore CONSIDERED, ADJUDGED, AND ORDERED that the judgment of the court below be in all things **affirmed**.

It is further **ORDERED** that the appellants, IDA NELKIN PANZER AND NEWTON B. SCHWARTZ, and their surety, Universal Surety of America, jointly and severally, pay all costs incurred by reason of this appeal.

It is further **ORDERED** that this decision be certified below for observance.

Judgment rendered by panel consisting of Justices Duggan, Mirabal, and Wilson.

Judgment entered DEC 1 1994

COURT OF APPEALS
FIRST DISTRICT OF TEXAS
COPY OF JUDGMENT

IDA NELKIN PANZER, SCHWARTZ, AND NEWTON B. SCHWARTZ, AND NEWTON B. SCHWARTZ, P.C., APPELLANTS NO. 01-91-01280-CV V. JOELLEN SNOW, GUARDIAN OF THE PERSON AND ESTATE OF GLADYS NELKIN, N.C.M., APPELLEE	Appeal from Probate Court Number Four of Harris County, Texas (Tr.Ct. No. 237,361). Opinion delivered by Justice Wilson, Justices Duggan and Mirabal also sitting.

The cause heard today by the Court is an appeal from the judgment rendered and entered by the court below on September 23, 1991. After hearing the cause on the record of the court below and inspecting the same, it is the opinion of this Court that there was no error in the judgment. It is therefore **CONSIDERED, ADJUDGED, AND ORDERED** that the judgment of the court below be in all things **affirmed**.

It is further **ORDERED** that the appellants, IDA NELKIN PANZER, NEWTON B. SCHWARTZ, AND NEWTON B. SCHWARTZ, P.C., and their surety, Universal Surety of America, jointly and severally, pay all costs incurred by reason of this appeal.

It is further **ORDERED** that this decision be certified below for observance.

Judgment rendered by panel consisting of Justices Duggan, Mirabal, and Wilson.

Judgment entered DEC 1 1994

Judgments affirmed and Opinion filed December 1, 1994

In The
COURT OF APPEALS
For The
FIRST DISTRICT OF TEXAS

NO. 01-90-01050-CV

IDA NELKIN PANZER AND NEWTON B. SCHWARTZ,
Appellants
V.
BEA BELKIN, JOELLEN SNOW, AND JOHN HUTCHISON,
Appellees

On Appeal from Probate Court No. One
Harris County, Texas
Trial Court Cause No. 237,361

NO. 01-91-01280-CV

IDA PANZER, NEWTON B. SCHWARTZ AND NEWTON B. SCHWARTZ, P.C.,
Appellants
V.
JOELLEN SNOW, GUARDIAN OF THE PERSON AND ESTATE OF GLADYS NELKIN, N.C.M.,
Appellee

On Appeal from Probate Court No. Four
Harris County, Texas
Trial Court Cause No. 237,361

O P I N I O N

These appeals arise from a guardianship action. In cause number 01-90-01050-CV, Ida Panzer (Panzer) and her attorney Newton B. Schwartz (Schwartz) (collectively, appellants), appeal certain orders entered by the trial court, including the imposition of sanctions against Schwartz. In cause number 01-91-01280-CV, Panzer and Schwartz appeal a summary judgment in favor of appellee Joellen Snow (Snow), the imposition of "death penalty" sanctions, the severance of certain claims and causes of action, and the approval of accounts for final settlement of the temporary and permanent guardianship. We affirm.

Factual and procedural background

1. The guardianship proceedings

On June 9, 1990, Beatrice Nelkin (Beatrice) filed an application to be appointed as permanent guardian of the estate and person of her mother-in-law, 90-year-old Gladys Nelkin (Gladys). On July 30, 1990, Panzer, Gladys's Daughter, filed a cross-application for permanent guardianship of Gladys. In addition, Panzer filed suit to force Beatrice to reconvey to Gladys's estate property that Gladys had conveyed to Beatrice in 1986. Panzer Gladys was mentally incompetent when she made the conveyance.

Because of an immediate need to liquidate certain assets of Gladys's estate to pay outstanding bills, Snow, an

attorney, was appointed temporary guardian of Gladys's person and estate on August 15, 1990. On September 4, Panzer filed a request for a jury trial on all issues regarding the guardianship. On September 11, Snow filed a cross-application for permanent guardianship.

On September 18, Panzer served Snow with a notice of intent to take her oral and video deposition, including a request for the following:

> (1) list of all cases on attached exhibit from Ray Hardy, Civil District Clerk[;]
>
> (2) list of all court appointments since 1978 including Probate Courts, showing fees earned and paid to you in each;
>
> (3) all income tax returns from 1985 to date[.]

On September 20, Snow filed a motion for a protective order and an application for authority to retain co-counsel. In her motion for a protective order, Snow argued, among other things, that: (1) the documents and information sought by Panzer were neither relevant nor reasonably calculated to lead to the discovery of admissible evidence; (2) the rules of civil procedure did not require her to prepare lists; and (3) the request for her tax returns was an invasion of her privacy under federal law. In her application to retain co-counsel, Snow stated that she had no jury trial experience and that it would be in Gladys's best interest if Snow retained co-counsel with such experience.

A. The September 24, 1990, hearing

On September 24, 1990, the trial court held a hearing (the September 24 hearing) and granted both Snow's

application for authority to retain co-=counsel and her motion for a protective order. The trial court also ordered that Schwartz pay Snow $300 in attorney's fees for preparing and presenting the motion for protective order. Joseph Horrigan (Horrigan) who represented Snow at the hearing, was appointed her co-counsel. The court also granted the request of Gladys's attorney ad litem, Lee Read (Read), to sever from the guardianship matter the suit for the recovery of the property Gladys conveyed to Beatrice.

Also at this hearing, the parties reached an agreement on several issues. They agreed to Snow's appointment as permanent guardian. They also agreed that Snow would file an amended motion to sell 1000 shares of Gladys's Consolidated Natural Gas stock. On September 27, 1990, pursuant to this agreement, Snow filed a first amended application for sale of personal property, in which she requested that the trial court enter an order authorizing the sale of the stock.

At the time of this hearing, the total fees and expenses for Snow, Horrigan, and Read totalled $16,509.65. (Snow had estimated the value of the estate to be $245,637.55.)

B. The agreed order

On October 10, 1990, the trial court entered an agreed order, signed by all parties, appointing Snow as Gladys's permanent guardian. The order additionally stated that Snow, Horrigan, and Read "shall be allowed reasonable attorneys' fees and expenses to be paid from the guardianship estate pursuant to Section 247 of the Texas Probate Code upon presentation of proper applications to the Court *or*

Jury."[1] (Emphasis added.) Snow deposition and the trial on the merits were canceled.

On October 8 (after the parties agreed to Snow's appointment but before Schwartz signed the agreed order), Panzer served Snow with interrogatories and requests for a record of fees Snow had received in the past for serving as a temporary or permanent guardian. This information was sought for use in an anticipated trial concerning the attorney's and guardian fee applications. Snow filed a second motion for a protective order on October 10. A hearing on the motion was set for October 25.

C. Judge Hutchison's recusal

On October 22, 1990, three days before the scheduled hearing, Panzer filed a motion to recuse the trial judge, appellee John Hutchison. On October 25, Judge Hutchison voluntarily recused himself. The scheduled hearing on Snow's motion for a protective order was not held, and Judge Hutchison took no further action in the lawsuit. At the time of his recusal, Judge Hutchison had taken no action on Snow's first amended application for sale of personal

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[1] The interlineation "or Jury" was apparently added by the court at a hearing held to obtain the trial judge's signature on the agreed order. On October 12, Horrigan filed a motion to modify, correct or reform the agreed order, in which he asserted that he was not present when the interlineation was made and that the order containing this interlineation did not represent the intent of the parties to the agreement. On October 18, ad litem Read filed a response to Horrigan's motion, in which she agreed that the interlineation "or Jury" added an element to the order that was not contemplated by the attorneys when the agreement was entered into. Judge Hutchison recused himself on October 25. The record does not reflect that any action was taken on Horrigan's motion to modify, correct or reform the agreed order.

property, in which she sought authority to sell 1,000 shares of stock.

On October 30, Panzer filed a motion for a new trial and a rehearing of all motions and orders entered by Judge Hutchison. No action was taken on this motion.

On November 8, 1990, the case was assigned to probate court number four, the Honorable William McCulloch presiding.

On November 20, 1990, Gladys died.

Cause number 01-90-01050-CV

On November 26, 1991, Panzer and Schwartz appealed the following orders entered by the trial court at the September 24, 1990, hearing: the order authorizing Snow to retain Horrigan as co-counsel; the protective order and imposition of $300 in sanctions against Schwartz; and the order severing Panzer's cross-claim against Beatrice for the reconveyance of real property back to the estate. In this appeal, Panzer and Schwartz further assert that Judge Hutchison's recusal from the case on October 25, 1990, voided all his orders and rulings.

1. Judge Hutchison's recusal

Appellants assert that because he recused himself, "all orders, particularly those involving discretion on the part of [Judge Hutchison], are void and a nullity and should be reversed and rendered." They had based their motion for recusal on the following unverified allegations:

(1) Snow had filed 76 percent of her cases in Judge Hutchison's court, and Read and Horrigan filed

40 percent of their cases in Hutchison's court;

(2) Snow and Horrigan had made political contributions to Hutchison's campaign;

(3) Horrigan and Hutchison were "close fishing buddies"' and

(4) Schwartz had represented parties in lawsuits against members of Hutchison's wife's family.

Appellants have cited no authority for their proposition that all actions of a judge who recuses himself are void. They correctly note that any order made by a *constitutionally disqualified* judge is a nullity. *Buckholts Indep. Sch. Dist. v. Glaser*, 632 S.W.2d 146, 148 (Tex. 1982). However, the doctrine of disqualification of judges is not the same as the doctrine of recusal.

The Texas Constitution sets out the grounds for disqualification:

No judge shall sit in any case wherein he may be interested, or where either of the parties may be connected with him, either by affinity or consanguinity, within such a degree as may be prescribed by law, or when he shall have been counsel in the case.

TEX. CONST. art. V, § 11. The Texas Rules of Civil Procedure elaborate on the grounds for disqualification, and separately set out the grounds for recusal. TEX. R. CIV. P. 18b (1), (2). In discussing rule 18b's predecessor statute, the supreme court stated, "The legislature's mention of motions to recuse shows that it did not intend a disqualification that would make all actions void." *Buckholts*, 632 S.W.2d at

148; *see also First Heights Bank v. Gutierrez*, 852 S.W.2d 596, 619 (Tex. App.--Corpus Christi 1993, writ denied) (decisions made by trial judge were not tainted by his later voluntary recusal). We hold that the orders entered by Judge Hutchison before his recusal are not void. We overrule point of error one.

2. Abuse of discretion

In their second point of error, appellants assert that the trial judge abused his discretion in granting Snow's motion for protective orders and granting $300 in sanctions against Schwartz, in severing Panzer's suit for the recovery of the property Gladys conveyed to Beatrice, and in granting Snow's motion to retain Horrigan as her co-counsel. An abuse of discretion occurs when a trial court acts arbitrarily, capriciously, and without reference to any guiding rules or principles. *Pedraza v. Tibbs*, 826 S.W.2d 695, 699 (Tex. App.--Houston [1st Dist.] 1992, writ dism'd w.o.j.).

A. Severance

As appellants acknowledge in their brief, Gladys's death in November 1990 rendered moot the severance of Panzer's cross-action regarding Gladys' 1986 conveyance of real property to her daughter-in-law Beatrice. Additionally, Panzer nonsuited this action on January 24, 1991; in her notice of nonsuit, she stated that Gladys had died, and that Panzer had therefore filed suit in her capacity as administratrix of Gladys's estate against Beatrice for reconveyance of the real property.

B. Appointment of co-counsel

Appellants also claim the trial judge abused his discretion by granting Snow's motion to hire Horrigan as her

co-counsel, with fees to be paid by Gladys's estate; they rely on no authority for this assertion, and argue only that "[r]easons of judicial economy argue most strongly against the Trial Court[']s appointing an attorney for an attorney . . . ."

The Texas Probate Code provides, in pertinent part, "Personal representatives of estates shall also be entitled to . . . all reasonable attorney's fees, necessarily incurred in connection with the proceedings and management of such estate, on satisfactory proof to the court." TEX. PROB. CODE ANN. § 242 (Vernon 1980).

Snow filed her cross-application for permanent guardianship because she believed that both Panzer and Beatrice had conflicts of interest that would disqualify them from serving as permanent guardian. Panzer requested a jury trial in the three-way contest for permanent guardianship. Snow, who was at that time temporary guardian, had no jury trial experience; she therefore asked the trial court for authority to retain co-counsel with jury trial experience. Appellants have suggested nothing other that "reasons of judicial economy" for their proposition that the trial court abused his discretion in authorizing Snow to retain Horrigan as her co-counsel. The fact that Snow is herself an attorney does not, by itself, indicate an abuse of discretion, and we cannot find that the trial court abused its discretion when it authorized Snow to retain co-counsel.

Further, as Snow notes, the October 10 agreed order, to which Schwartz agreed both in open court and in writing, specifically provides that Horrigan's attorney's fees were to be paid from the guardianship estate, pursuant to probate code section 247. We agree with Snow that the agreed order, by its terms, renders this issue moot.

C. The motion for protective order and sanctions

Appellants assert that the trial court's order granting Snow's motion for a protective order and imposing sanctions on Schwartz constituted an abuse of discretion because the information sought was either relevant or would lead to the discovery of relevant and admissible evidence. Specifically, appellants assert that in the contest for permanent guardianship, Snow's customary and usual attorney's and guardian's fees and her jury trial experience were relevant issues.

Snow asserts that the only relevant issue in the guardianship contest concerned the qualifications of the contestants, and the information sought by Panzer was therefore irrelevant. She also asserts that the October 10 agreed order renders the discovery issue moot. Finally, she argues that because Schwartz failed to request a reservation of his right to appeal the sanctions, he has waived his right to appeal the issue.

On September 4, 1990, Panzer filed her request for a jury trial on all issues. On that date, only she and Beatrice were contestants for the guardianship. On September 11, Snow filed her cross-application for permanent guardianship. On September 18, Panzer served Snow with her notice of intent to take Snow's deposition, which included a request for certain documents. Two days later, Snow filed her application for authority to retain co-counsel and her motion for a protective order. At the September 24 hearing, (memorialized in the October 10 agreed order) the parties agreed to Snow's appointment as permanent guardian.

In her notice of intent to take oral and video deposition, Panzer asked Snow to provide the following:

> (1) list of all cases on attached exhibit from Ray Hardy, Civil District Clerk[;][2]
>
> (2) list of all court appointments since 1978 including Probate Courts, showing fees earned and paid to you in each;
>
> (3) All income tax returns from 1985 to date[.]

In her motion for a protective order, Snow stated that: (1) the documents and information sought by Panzer were neither relevant nor reasonably calculated to lead to the discovery of admissible evidence; (2) the rules for civil procedure did not require her to prepare lists; (3) the request for her tax returns was an invasion of her privacy under federal law; and (4) the request constituted "an undue burden, unnecessary expense, harassment, annoyance, and invasion of personal, constitutional, and property rights." At the September 24 hearing, Schwartz stated:

> We will agree with one thing, Your Honor, she did not need to go in and fill in the names of her cases on the computer list. We can do that. But we can do no more than that to tell what her attorney's fees were. We can determine if the same was a jury trial. She

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[2] This exhibit was a six-page computer print-out of docket numbers. In his arguments at the September 24 hearing, Horrigan stated:

> The cases that are attached are listed solely by docket number, and basically what Mr. Schwartz is asking Mrs. Snmow to do is go through her files, I suppose, and put a name with a docket number and then further go through her files and put a fee with a name and a docket number. To what purpose? What purpose could that possibly serve? As the Court knows, Mrs. Snow has no obligation to Mr. Schwartz to do his work for him. She has no obligation to compile extensive lists of anything.

> has alleged she has never been in a jury trial in twelve years. We can do that by public record, going to the docket and checking to see if a jury trial was demanded and if a jury tried it. If there are jury issues in the case, that speaks for itself.

We understand Schwartz's comments to mean that Panzer abandoned the first item on her request for production (the list of cases relating to the computer print-out from the district clerk's office). Her remaining requests thus consisted of a list of all Snow's court appointments and fees earned from such appointments, and Snow's income tax returns.

Panzer's notice of intent to take Snow's deposition, with its request for production of certain documents, was filed in connection with the contest for appointment as Gladys's permanent guardian. We agree with Snow that the entry of the agreed order appointing her as permanent guardian renders moot any complaints appellants may have had concerning the protective order.

We further agree that the information Panzer sought was not relevant to the appointment of a permanent guardian, nor was it calculated to lead to the discovery of admissibie evidence. Appellants state in their brief that the requested information was relevant because Snow's customary fees and her jury trial experience were at issue. However, the contest for permanent guardianship concerned the qualifications of the applicants for the position. The amount of Snow's usual and customary fees was an issue separate and apart from her qualifications to serve as Gladys' permanent guardian. Additionally, because Panzer's request for production preceded Snow's application for authority to retain co-counsel, Snow's lack of jury trial experience was not an issue at that time, and was certainly not relevant at that time to her qualifications to serve as Gladys' guardian. We find

that the trial court did not abuse its discretion in granting Snow's motion for a protective order.

We similarly find that the court did not abuse its discretion in assessing sanctions in the amount of $300 against Schwartz. Rule 215(3) of the Texas Rules of Civil Procedure provides in part for sanctions, including attorney's fees, in the event a party is abusing the discovery process in seeking discovery. *City of Colleyville v. Powell*, 846 S.W.2d 126, 128 (Tex. App.--Fort Worth 1993, writ denied)). Panzer requested discovery of information that Schwartz admitted he could easily obtain, and information that was neither relevant nor calculated to lead to admissible evidence. The trial court limited its sanctions to the amount of Snow's attorney's fees for preparing the motion for protective order. We cannot say the trial court abused its discretion in sanctioning Schwartz.

We overrule point of error two.

3. Request for damages for frivolous appeal

Snow asks this Court to impose damages against appellants for bringing a frivolous appeal. TEX. R. APP. P. provides that when a appellant has taken an appeal for delay and without sufficient cause, a court of appeals may award damages to each prevailing appellee.

A court of appeals will not impose a penalty for a frivolous appeal unless the record clearly shows that the appellant has no reasonable expectation that the judgment will be reversed, and the appellant has not pursued the appeal in good faith. At appellate court should impose damages only if the likelihood of a favorable result was so improbable as to make the appeal one taken for delay and without

sufficient cause. *Tindle v. Jackson Nat'l Life Ins. Co.*, 837 S.W.2d 795, 801 (Tex. App.--Dallas 1992, no writ).

We note that appellants appealed an issue (the severance) that they acknowledged in their brief to be moot. They also appealed orders of the trial court--granting Snow's application for authority to retain co-counsel and her motion for protective orders -- that became moot when they agreed to Snow's appointment as permanent guardian. However, we are unwilling to hold that the appeal in its entirety was taken without sufficient cause and for the purpose of delay. Snow's request for sanctions is denied.

Facts relevant to cause number 01-91-01280-CV

After her mother dies, Panzer, Gladys's sole beneficiary, filed an application for letters of administration in probate court number three. On November 26, 1990, in probate court number four, Panzer filed a motion to close out the guardianship estate. In this motion, Panzer asserted that the probate court in which she filed her application for permanent administration of Gladys's estate

> will assume and will have exclusive and sole jurisdiction over any and all claims, if any, filed against the Estate of Gladys Nelkin, deceased, including those, if any, arising out of or during the time period August 15, 1990 to November 20, 1990 the date of her death during the pendency of a Temporary and Permanent Guardianship . . . .

Snow filed her opposition to Panzer's motion on November 29, 1990. Panzer was appointed administratrix of Gladys's estate on December 11, 1990. On December 21, 1990, Panzer filed "Ida Panzer's cross claim, counter claim, offset (in addition to all prior objections) to application for

authority to pay attorneys fees to co-counsel" in which she complained of the "neglect, negligence, default and wilful failure and refusal of" Snow to sell shares of Consolidated Natural Gas. The trial court denied Panzer's motion to close out the guardianship estate on April 1, 1991.

Panzer opposed all accounts for final settlement of the temporary and permanent guardianships filed by Snow; Panzer also opposed all applications for payment of attorneys' fees and expenses filed by ad litem Read, and by Snow on behalf of herself and co-counsel Horrigan.

In March 1991, Panzer served Snow, Read, and Horrigan with requests for production. She sought income tax returns for the years 1988 through 1990, as well as numerous records concerning income from the practice of law, billing information, and records of all expenses paid or incurred in the practice of law during the three specified years.

Snow, Read, and Horrigan filed motions to quash. The trial court held a hearing on April 17, 1991, and granted the motions to quash on June 13.[3]

In her account for final settlement of permanent guardianship, Snow again requested authority to sell the Consolidated Natural Gas stock. On April 12, 1991, Panzer filed an objection to Snow's proposed sale. The trial court

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[3] The trial court's order provided that Snow, Horrigan and Read furnish Panzer with statements of fees and expenses relating to the legal services performed in connection with the case; the trial court found that the statements of fees and expenses attached to the attorneys' applications for payment met the requirements of its order, and ordered the attorneys to furnish Panzer with copies of these statements.

deferred ruling on Snow's request to sell the property until the final account was approved by the court.

In July 1991, Panzer filed a counter- and cross-claim against Snow[4] in which she asserted that she had a prior right of appointment as Gladys's temporary and permanent guardian. Panzer alleged that Snow was grossly negligent in failing to sell the 1,000 shares of Consolidated Natural Gas, and that Snow breached her fiduciary duties. Panzer sought actual damages of $17,000 and punitive damages of $100,000.

On July 23, 1991, Snow filed a motion for sanctions against Panzer and Schwartz. On August 2, she filed a supplemental motion for sanctions. The motions were filed pursuant to TEX. R. CIV. P. 13, 21b, and 215 (2)(b).

On July 31, Panzer served Snow, Horrigan, and Read, as well as several designated witnesses, with notices to take their depositions; the accompanying subpoenas duces tecum sought:

> 1. All records including time sheets, billing statements, applications for fees and expenses of MR. JOSEPH S. HORRIGAN, MS. LEE READ AND MS. JOELLEN SNOW in this proceeding from August 1, 1990 to date, all other material furnished to you including but not limited to correspondence from any of the foregoing three attorneys, their employees, agents, or attorneys or representatives.

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[4] This pleading was entitled, "Motion to dismiss, special exceptions and cross-applicant Ida Panzer's objections to the court[']s jurisdiction and subject thereto, to application by guardian Joellen Snow for authority to pay attorney's fees & Counter & cross claim."

> 2. All records of referrals of client [sic] to and from each of the three attorneys named above and agreements documenting or memorializing the same. All existing records of the total of such fee sharing or referral agreements; all records of all fees received by Mr. Van Whittner and Ms. Dalia Stokes, your curriculum vitae, and all other records relating to your expert testimony in this case including all source materials for each of your opinions and all other materials for each of your opinions and all other materials upon which you base any and all of your opinions; all records of your "expertise and past experience."

Snow filed another motion for protective order. The trial court entered two protective orders. In an order dated August 1, the trial court ordered production of some of the requested information, required an *in camera* inspection of some of the documents, and limited production of other documents to the records ordered produced in its order of June 13, 1991 (statements of fees and expenses).

On July 23, 1991, Snow filed her motion for summary judgment on Panzer's counter- and cross-claim. In her motion, Snow noted that she had filed an answer in which she had raised the affirmative defenses of estoppel and lack of authority, and that the pleadings, motions and other papers on file demonstrated that there was no genuine issue of material fact and that she was entitled to summary judgment as a matter of law. The trial court entered a summary judgment in Snow's favor on August 23, 1991.

On August 19, seven days before the scheduled trial, Panzer filed a motion to recuse Judge McCulloch. The motion was denied. The trial court also deferred any ruling on Snow's first supplemental motion for sanctions.

A contentious voir dire began on August 27 and continued through August 28. Both Schwartz and Horrigan moved for a mistrial. The trial court denied Schwartz's motion, but granted Horrigan's. The trial court found that Schwartz repeatedly exceeded the bounds of proper voir dire, repeatedly mentioned matters otherwise inadmissible in evidence, and made statements and asked questions that were intended to instill prejudice against Snow and that could not be cured by instruction. On September 23, the trial judge entered an order for severance and order imposing sanctions (the severance/sanctions order) in which he found, among other things, that numerous papers filed in the case by Panzer contained statements that Schwartz and Panzer knew to be brought in bad faith, groundless, and brought for the purposes of harassment. The trial court struck Panzer's pleadings with prejudice. The trial court also severed Panzer's pleadings with prejudice. The trial court also severed Panzer's claims and causes of action against Snow (which were the subject of Snow's motion for summary judgment), as well as Panzer's oppositions and objections to Snow's accountings.

The trial court held a trial on the merits and on September 23, 1991, and signed an order approving Snow's accounting and awarding attorneys' fees and expenses in the amount of $134,960.29.

Cause number 01-91-01280-CV

In cause number 01-91-01280-CV, Panzer and Schwartz appeal: (1) the summary judgment in favor of Snow, and (2) the trial court's orders imposing death penalty sanctions and severing Panzer's claims and causes of action against Snow.

1. Jurisdiction of trial court

In Panzer's first two points of error and Schwartz's first point of error, appellants assert that the trial court lost jurisdiction over the guardianship on November 20, 1990, the day Gladys died. They argue that the trial court should have taken immediate action to settle and close the guardianship by immediately ordering Snow to file an account for final settlement and by setting the matter for a jury trial.

Appellants correctly note that the Probate Code provides in pertinent part that the guardianship of the persons and estates of wards shall be settled and closed when an incompetent ward dies. TEX. PROB. CODE ANN. § 404(a)(3) (Vernon Supp. 1994). Former section 404A of the Probate Code, in effect at the time, further provided:

> Notwithstanding the provisions of [section 404], before the guardianship of the persons and the estates of wards shall be closed upon the death of any ward, the guardian subject to the approval of the Court may make all funeral arrangements, pay for such funeral expenses out of the estate of the deceased ward and pay all other debts out of such estate. If a personal representative of the estate of a deceased ward is appointed, the court shall on the written complaint of the personal representative cause the guardian to be cited to appear and present a final account as provided in Section 406 of this Code.

Act of May 27, 1979, 66th Leg. R.S., ch. 758, 1979 Gen. Laws 1876, 1876, *repealed by* Act of May 30, 1993, 73d Leg., R.S. ch. 957, § 75m 1993 Gen. Laws 4081, 4182.

Snow filed her final account on the temporary guardianship on December 6, 1990, and her final account on the permanent guardianship on February 20, 1991. Panzer filed numerous objections to Snow's final accounts and applications for attorney's fees; additionally, in December 1990, after Gladys's death, Panzer also filed her initial cross- and counter-claim against Snow.

When a ward dies, the powers of the guardian and of the probate court cease, excepting those powers that, in effect, are regarded as incidental to the proper closing and settlement of the estate. *Baldwin v. Davis Hill Oil Co.*, 245 S.W.2d 353, 359 (Tex. Civ. App.--Beaumont 1951, writ ref'd n.r.e.). In this case, the trial court clearly had jurisdiction to act on Snow's final accounts and matters incidental to the closing and settlement of the estate. Appellants do not assert that any of the actions taken by the trial court after Gladys's death were unrelated to the closing and settlement of the estate. We overrule Panzer's first and second points of error and Schwartz's first point of error.

2. Severance

In her fourth point of error, Panzer argues that "the trial court erred in ordering that the interlocutory order granting Joellen Snow's motion for summary judgment . . . be made a final judgment, disposing completely of all issues between Ida Panzer and Joellen Snow . . . insofar as Ida Panzer's claims against Joellen Snow are concerned." In her fifth point of error, Panzer complains that the trial court erred in finding that "the claims and causes of action of Ida Panzer against Joellen Snow, together with Ida Panzer's opposition or objections to Joellen Snow's accounting . . . may be severed and proceeded with separately." In her sixth point of error, Panzer asserts the trial court abused its discretion in ordering that her opposition or objections to

Snow's accountings be severed and made the subject of a separate action.

In its severance/sanctions order, in which the trial court struck all Panzer's pleadings, the trial court noted the following:

> 1. The causes of action and claims of Ida Panzer against Joellen Snow were heretofore disposed of by this Court in its Order Granting Joellen Snow's Motion for Summary Judgment;
>
> 2. Any opposition or objection by Ida Panzer to the accountings . . . has been disposed of by this Court's ruling imposing sanctions against Ida Panzer and her counsel, in this cause, which ruling imposing sanctions struck the pleadings of Ida Panzer in their entirety.

The trial court then ordered the severance of all Panzer's claims and causes of action against Snow, as well as her opposition or objections to Snow's accountings, pursuant to TEX. R. CIV. P. 41. Panzer asserts that the severance denies and destroys her appellate rights. We disagree.

A claim may be properly severed if it is part of a controversy that involves more than one cause of action. *Cherokee Water Co. v. Forderhause*, 641 S.W.2d 522, 525 (Tex. 1982). A trial judge has broad discretion in the manner of severance of causes. *Id.* Panzer's causes of action that were the subject of Snow's motion for summary judgment were severed after the summary judgment was granted, possibly to expedite appellate review. Under the facts, we cannot find that the trial judge abused his discretion

in severing these causes of action.[5]

We similarly cannot find that the trial judge abused his discretion in severing Panzer's opposition or objections to Snow's accounting. In *Transamerican Natural Gas Corp. v. Powell*, the supreme court held:

> [W]hen a trial court imposes discovery sanctions which have the effect of precluding a decision on the merits of a party's claims -- such as by striking pleadings, dismissing an action, or rendering default judgment -- a party's remedy by appeal is inadequate, unless the sanctions are imposed simultaneously with the rendition of a final, appealable judgment.

811 S.W.2d 913, 920 (Tex. 1991). We cannot understand Panzer's argument that the severance destroyed her appellate rights; *Transamerican* makes it clear that such a severance insures that an appellant has an adequate remedy by appeal. We overrule Panzer's fourth, fifth and sixth points of error.

3. Motion for mistrial

In his third point of error, Schwartz asserts that the trial court erred in not granting his motion for a mistrial, which was based on Horrigan's "impermissible, highly prejudicial, incurable injection into appellees[']s voir dire jury panel examination of the fact that Ida Panzer is Jewish and the court[']s instructions, sua sponte, to the panel." In his fourth point of error, Schwartz asserts that "the court[']s ruling on appellees' explanations for striking minority jurors

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[5] We disagree with Panzer that the summary judgment and the severance of the causes of action relating to the summary judgment somehow disposed of Panzer's claims against Snow with respect to her accounting.

were erroneous and such jurors should have been returned to the panel or a mistrial declared and a new panel selected."

Schwartz's assertions that the trial judge and Horrigan attempted to "poison" the jury panel against Panzer and that Horrigan struck two jurors for racially-motivated reasons are not supported by the record. Even if the record supported these allegations, however, there would be no reversible error. The trial judge denied Schwartz's motion for a mistrial, but *granted* Horrigan's motion for a mistrial. The relief appellants sought was granted. We cannot see how appellants could possibly be harmed by the trial court's action.

We further agree with Snow that Schwartz has no standing to raise this issue. He was not a party to the litigation; only Panzer was in a position to be affected by the trial court's rulings on these matters. We overrule Schwartz's third and fourth points of error.

4. Death penalty sanctions

In Panzer's points of error seven through 11 and Schwartz's second point of error, appellants raise various arguments concerning the imposition of "death penalty" sanctions against Panzer.

The trial court struck Panzer's pleadings on September 23, 1991. On October 11, 1991, the trial court entered the following findings and conclusion of law:

FINDINGS OF FACT

1. Joellen Snow qualified as Temporary Guardian of the Person and Estate of Gladys Nelkin, NCM, on August 24, 1990.

2. On September 24, 1990, an Order was signed by Probate Court No. 1 granting Joellen Snow the authority to retain co-counsel, namely, Joseph S. Horrigan.

3. On September 24, 1990, in open court, a settlement was reached among the parties in this cause whereby, among other things, it was agreed that Joellen Snow would be appointed Permanent Guardian of the Person and Estate of Gladys Nelkin, NCM.

4. In an Agreed Order signed on October 10, 1990, and approved as to form and substance by all counsel in the case, Joellen Snow was appointed as Permanent Guardian of the Person and Estate of Gladys Nelkin, NCM, and qualified as such on October 10, 1990.

5. Gladys Nelkin died on November 20, 1990, in Houston, Harris County, Texas.

6. The following pleadings, motions, or other papers (hereinafter called collectively, the "Papers"), filed in this cause by or on behalf of Ida Panzer, were groundless and brought in bad faith or were groundless and brought for the purpose of harassing Joellen Snow:

a. Ida Panzer's Notice of Intent to Take Oral and Video Deposition of Joellen Snow, with Duces Tecum attached, filed on or about September 18, 1990.

b. Motion to Dismiss, Special Exceptions, and Cross-Applicant Ida Panzer's Objections to the Court's Jurisdiction and Subject Thereto, to Application by Guardian Joellen Show for Authority to Pay Attorney's Fees & Counter & Cross-Claim, filed on or about July 8, 1991.

c. Ida Panzer's Cross-Motion for Sanctions against Mr. Horrigan Re: His Noticing Deposition of Judge Weldon H. Berry, Without Prior Consultation with Panzer's Counsel, filed on or about July 29, 1991.

d. Panzer's Second Motion for Sanctions Against Joseph Horrigan and his Process Server John Doe, filed on or about August 6, 1991.

e. Ida Panzer's Notice of Intent to Take Oral and Video Depositions of Joseph S. Horrigan, Joellen Snow, Lee Read, Betty Callaway, Esther Steinberg, Dalia Stokes, and Van Wittner, filed on or about July 31, 1991, together with Duces Tecum attached thereto.

f. Ida Panzer's Motion to Recuse or Disqualify Judge, filed on August 19, 1991, which was 6 days prior to the trial set for August 26, 1991, in this cause.

g. Ida Panzer's Motion To Exclude Expert and Claimants' Snow and Horrigan's Testimony Re Attorney's Fees, filed on or about August 26, 1991.

h. Ida Panzer's Objections to Order Granting Motion For Mistrial and Motion to Expunge, filed on or about September 3, 1991.

7. All of the Papers referred to above, were signed by Newton B. Schwartz.

8. Of the Papers referred to in Finding of Fact No. 6, above, the following were filed in abuse of the discovery process:

a. Ida Panzer's Notice of Intent to Take Oral and Video Depositions of Joellen Snow, with Duces Tecum attached, filed on or about September 18, 1990.

b. Ida Panzer's Notice of Intent to Take Oral and Video depositions of Joseph S. Horrigan, Joellen Snow, Lee Read, Betty Callaway, Esther Steinberg, Dalia Stokes and Van Wittner, filed on or about July 31, 1991, together with Duces Tecum attached, thereto.

9. Ida Panzer's Subpoenas Duces Tecum, served on Joellen Snow, Joseph S. Horrigan and Lee Read, and issued on or about March 12, 1991, were also filed in abuse of the discovery process. (Such Subpoenas Duces Tecum are hereafter collectively referred to as the "Subpoenas".)

10. Ida Panzer's Motion to Recuse or Disqualify Judge, filed on August 19, 1991, was brought solely for the purpose of delay and without sufficient cause, and was not filed at least ten days before August 26, 1991, which was the date set for trial in this case.

11. Newton B. Schwartz has represented Ida Panzer at all times in this cause.

12. The signature of Newton B. Schwartz on the Papers, referred to above, constitutes certificates by Newton B. Schwartz that he has read such Papers; and that to the best of his knowledge, information and belief formed after reasonable inquiry, such Papers are not groundless and brought for the purpose of harassment.

13. Newton B. Schwartz, as an attorney, is an officer of the Court and should be held to a higher standard than Ida Panzer, in terms of duties owed to the court system.

14. Ida Panzer and Newton B. Schwartz (hereinafter collectively called "Respondents") both read all of the Papers and Subpoenas referred to above, before such Papers and Subpoenas were filed in this cause.

15. Respondents, jointly and severally, during the course of the proceedings in this case, took positions that unreasonably increased the cost or other burdens of the case and that unreasonably delayed resolution of the matters before the Court.

16. Ida Panzer was aware of her counsel's conduct and of the meaning and content of the Papers and

Subpoenas filed in this case, and she condoned and encouraged such conduct and such filings.

17. Newton B. Schwartz has a prior history of sanctionable conduct in this cause.

18. Respondents have acted in bad faith in filing the Papers and the Subpoenas.

19. Newton B. Schwartz has extensive experience in dealing with the court system.

20. The conduct of Respondents in signing and/or filing the Papers and the Subpoenas, referred to above, is representative of a plan, pattern or course of sanctionable conduct by Respondents in this case which demonstrates their flagrant bad faith and which has been systematically carried on for the purposes of harassment, delay and unjustified increase in the cost or other burdens of this case. (Such plan, pattern or course of sanctionable conduct shall be hereinafter referred to as the "bad faith course of conduct").

21. The bad faith course of conduct is attributable to both Ida Panzer and her counsel.

22. This Court granted a mistrial in this case, after considering Joellen Snow's Motion for Mistrial and Respondents' opposition to such Motion.

23. Conduct and statements by Newton B. Schwartz during the voir dire examination of the panel of potential jurors in this case caused a mistrial in this case.

24. The conduct and statements by Newton B. Schwartz during the voir dire examination constitute another example of the bad faith course of conduct by Respondents, referred to above.

25. The bad faith course of conduct by Respondents has resulted in burdens on the court system attributable to such course of conduct, including consumption of judicial time and incurrence of juror fees and other court costs.

26. The bad faith course of conduct by Respondents, referred to above, has been willful.

27. The bad faith course of conduct on the part of Respondents, referred to above, has been frivolous.

28. The degree of willfulness and frivolousness involved herein on the part of the Respondents is serious and high.

29. The bad faith course of conduct by Respondents referred to above, has been designed to harass Joellen Snow and her co-counsel, Joseph S. Horrigan.

30. The bad faith course of conduct by Respondents, referred to above, has been designed to prevent Joellen Snow from receiving a fair trial in this case.

31. Respondents have consistently engaged in the bad faith course of conduct, referred to above, in this cause.

32. Such bad faith course of conduct, referred to above, has been systematically carried on by Respondents for the purposes of harassment, delay and unjustified increase in the cost or other burdens of this case.

33. Newton B. Schwartz has used the law's procedures in this case to harass and intimidate others, rather than for legitimate purposes.

34. Newton B. Schwartz knowingly made false statements of material facts or law to this Court.

35. Respondents should be severely sanctioned for their conduct in this case.

36. This Court Order striking Respondents' pleadings, with prejudice, was a just sanction to be imposed upon Respondents.

37. The Court has considered less stringent sanctions, and finds them to be inadequate.

38. The sanction of striking Respondents' pleadings, with prejudice, was not excessive.

39. Good cause existed for striking the pleadings of Respondents, for the reasons set forth in these Findings of Fact and Conclusion of Law.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and the subject matter in this case.

2. Respondents, Ida Panzer and Newton B. Schwartz have both violated Rule 13 of the Texas Rules of Civil Procedure in this case.

3. Respondents have both violated Rule 215 of the Texas Rules of Civil Procedure in this case.

4. Rules 13 and 215-3 of the Texas Rules of Civil Procedure authorize this Court to impose the sanctions provided in Rule 215-2b(5) of the Texas Rules of Civil Procedure, to-wit, an Order striking the pleadings of Respondents.

5. Ida Panzer's Motion to Recuse or Disqualify Judge, filed on August 19, 1991, was not timely filed under Rule 18a of the Texas Rules of Civil Procedure, in that it was not filed at least ten days before the date set for trial in this Court.

6. The provisions of Rule 18a of the Texas Rules of Civil Procedure requiring a trial judge to either recuse himself or refer a Motion to Recuse or Disqualify to another Judge never came into play with regard to Ida Panzer's Motion to Recuse or Disqualify Judge, because such Motion was not timely filed.

7. Newton B. Schwartz has violated the Texas Disciplinary Rules of Professional Conduct in this case, in the following respects:

a. Newton B. Schwartz' conduct did not conform to the requirements of the law, and Newton B. Schwartz used the law's procedures to harass or intimidate others rather than for legitimate purposes,

as prohibited by Paragraph 4 of the Preamble of such Disciplinary Rules.

b. During the course of these proceedings, Newton B. Schwartz took positions that unreasonably increased the costs or other burdens of the case or that unreasonably delayed resolution of the matter, as prohibited by Rule 3.02 of such Disciplinary Rules.

c. Newton B. Schwartz knowingly made false statements of material facts or law to this Court, as prohibited by Rule 3.03 of said Disciplinary Rules.

8. Conduct and statements by Newton B. Schwartz during the voir dire examination of the panel of potential jurors in this cause constituted grounds for a mistrial, in that such conduct and statements were designed to instill in the members of the jury panel prejudice against Joellen Snow.

9. The sanctions imposed upon Respondents in this case, to-wit, an Order striking Respondents' pleadings, were necessary, proper, justified, and appropriate under the facts and circumstances of this case.

Appellants filed a request for additional and/or amended findings of fact and conclusions of law, alleging that the trial court's findings and conclusions did not meet appellants' specific requests. The trial court did not make additional or amended findings.

The sanctions imposed by the trial court are among those authorized by TEX. R. CIV. P. 215. The choice of sanctions is left to the sound discretion of the trial court. *Transamerican*, 811 S.W.2d at 917. In exercising its

discretion in choosing the appropriate sanction, the trial court is not limited to considering only the specific violation for which sanctions are finally imposed, but can consider everything that has occurred during the history of the litigation. *Berry-Parks Rental Equip. Co. v. Sinsheimer*, 842 S.W.2d 754, 757 (Tex. App.--Houston [1st Dist.] 1992, no writ).

Rule 215(2)(b) requires that any sanctions imposed be "just." *Transamerican*, 811 S.W.2d at 917. Whether an imposition of sanctions is just is measured by two standards. First, a direct relationship must exist between the offensive conduct and the sanction imposed. A just sanction must be directed against the abuse and toward remedying the prejudice caused the innocent party. Also, the sanction must be imposed upon the offender. The trial court must attempt to determine whether the offensive conduct is attributable to counsel, to the party only, or to bother. *Id.* Second, the sanctions must not be excessive; the "punishment should fit the crime" and should be no more excessive than necessary to satisfy its legitimate purpose. A court must therefore consider the availability of less stringent sanctions. *Id.*

Additionally, death penalty sanctions should be used only when the sanctioned party's conduct justifies a presumption that its claims or defenses lack merit. *Remington Arms Co. v. Caldwell*, 850 S.W.2d 167,171 (Tex. 1993).

The trial court's findings of fact and conclusions of law are well-supported by the record. The trial judge determined that appellants conducted this litigation in a manner that was apparently intended to protract the litigation and harass Snow. We cannot find that the trial court abused its discretion in striking Panzer's pleadings. Panzer's points

of error seven through 11 and Schwartz's second point of error are overruled.

5. Summary judgment

In her July 9, 1991, "counter & cross claim" against Snow, Panzer asserted a cause of action against Snow for gross negligence, negligence, and lack of diligence based on Snow's failure to sell shares of Consolidated b.v Natural Gas stock. On July 23, 1991, Snow moved for summary judgment on these issues. The trial court granted Snow's motion for summary judgment on these issues on August 23, 1991.

On September 23, the trial court entered its severance/sanctions order, in which it ordered "all pleadings, motions, and other papers filed in this cause by [appellants] are hereby struck, with prejudice . . . ."

In her third point of error, Panzer asserts the trial court erred in granting Snow's motion for summary judgment. As noted, the trial court struck *all* Panzer's pleadings, including the "counter & cross claim" upon which the trial court granted summary judgment in Snow's favor. Because of our disposition of Panzer's points of error seven through 11 and Schwartz's second point of error, affirming the imposition of death penalty sanctions, this point of error is moot.

6. Remaining issues

In his fifth point of error, Schwartz asserts that "substantially all of the trial court's findings of fact and conclusions of law were clearly erroneous and not supported by the evidence" and do not support the sanctions imposed. He additionally argues: (1) that the appellants were

prejudiced by the trial court's failure to make additional, requested findings and conclusions; (2) the trial court impermissibly "rubber stamp approved" findings and conclusions prepared by Horrigan; and (3) the trial court's findings and conclusions did not dispose of all issues in the lawsuit.

We have already noted that there is adequate support in the record for the trial court's findings and conclusions., We further note that Schwartz has offered no authority to support the latter two contentions in this multifarious point of error. Schwartz's fifth point of error is overruled.

We affirm the trial court's judgments.

/s/ Davie L. Wilson
Davie L. Wilson
Justice

Justices Duggan and Mirabal also sitting.

Do not publish. TEX. R. APP. P. 90.

Judgment rendered and opinion delivered DEC 1 1994
True Copy Attest:

/s/ Margie Thompson
Margie Thompson
Clerk of Court

APPENDIX B

0551115 665-26-1010

NO. 237,361

GUARDIANSHIP OF	§	IN THE PROBATE
	§	COURT
GLADYS NELKIN,	§	NUMBER FOUR (4)
NCM	§	HARRIS COUNTY,
	§	TEXAS

ORDER FOR SEVERANCE AND ORDER IMPOSING SANCTIONS

BE IT REMEMBERED that commencing on the 15th day of August, 1991, there came on to be heard in the above cause certain Motions for Sanctions and other papers filed herein by Joellen Snow, Permanent Guardian of the Person and Estate of Gladys Nelkin, NCM, such Motions and other papers seeking an Order of this Court imposing sanctions upon Ida Panzer and her attorneys, Newton B. Schwartz, P.C., Newton B. Schwartz, and Barry S. Berger. Such Motions and papers include the following: (1) Motion for Sanctions, filed on or about July 23, 1991; (2) Supplemental Motion for Sanctions filed on or about August 2, 1991' (3) Opposition to Motion to Recuse or Disqualify Judge, filed on or about August 19, 1991; and (4) First Supplemental Motion for Sanctions filed on or about September 3, 1991. Such Motions and papers sought sanctions against Respondents, for alleged violations of the provisions of Rules 13, 18a(h), 21b and 215 of the Texas Rules of Civil Procedure, as authorized by Rules 13, 18a(h), 21b and 215. An evidentiary hearing took place with respect to such Motions and other papers, which commenced on August 15, 1991, continued on August 16, 1991, further continued on August 23, 1991, and concluded on September 3, 1991. Joellen Snow appeared at such hearing, in her capacity as Guardian

of the Person and Estate of Gladys Nelkin, NCM, and in her capacity as co-counsel for such Estate. Joseph S. Horrigan, of the firm of Horrigan & Goehrs, also appeared as co-counsel for Joellen Snow. Ida Panzer appeared in person and through her counsel, Newton B. Schwartz, P.C. and Newton B. Schwartz. Barry S. Berger, also named as a Respondent in said Motion for Sanctions, did not appear, although duly served, but a stipulation of evidence was filed and admitted into evidence, by agreement of counsel and the parties, concerning the evidence that would have been elicited from Barry S. Berger had he been called as a witness at such hearing.

BE IT FURTHER REMEMBERED that on September 5, 1991, there came on to be considered, on the Court's own Motion, the matter of severing and making the subject of a separate proceeding the claims and causes of action heretofore filed herein by Ida Panzer, as well as Ida Panzer's opposition or objections to the following accountings filed in this cause by Joellen Snow, Permanent Guardian of the Person and Estate of Gladys Nelkin, NCM:

1. Account for Final Settlement of Temporary Guardianship;

2. First Supplemental Account for Final Settlement of Temporary Guardianship;

3. First Amended Account for Final Settlement of Permanent Guardianship; and

4. First Supplemental Account for Final Settlement of Permanent Guardianship.

The Court, having examined the Motions for Sanctions, the Responses thereto, having heard the testimony

of witnesses, having reviewed the other evidence presented at such hearing, having examined the relevant pleadings and other papers on file in this cause, and having heard the argument of counsel, makes the following findings:

1. That no sanctions should be imposed upon Barry S. Berger.

2. That numerous papers filed in this cause by Respondent, Ida Panzer, including but not limited to the following, contain statements which Respondents Newton B. Schwartz, P.C., Newton B. Schwartz and Ida Panzer knew to be brought in bad faith, groundless, and brought for the purpose of harassment:

a. Ida Panzer's Notice of Intent to Take Oral and Video Deposition of Joellen Snow and duces tecum filed on or about September 18, 1990 requesting production of the following:

1. List of all cases on an attached exhibit from Ray Hardy, Civil District Clerk, attached to such duces tecum.

2. List of all court appointments since 1978 including Probate Courts, showing fees earned and paid to Joellen Snow in each.

3. All income tax returns of Joellen Snow from 1985 to date.

The Court granted a Protective Order on September 24, 1990 denying the request for production and ordering Newton B. Schwartz to pay $300.00 as reasonable attorney's fees.

b. Ida Panzer's Motion to Close Out Guardianship filed on or about November 23, 1990, Reply and Supplement to her Motion to Close Out Estate Forthwith filed on or about December 3, 1990, and Objections to Account for Final Settlement of Permanent Guardianship filed on or about March 1, 1991, in which Ida Panzer alleges the Court no longer had jurisdiction to hear matters incident to the account for Final Settlement of Permanent Guardianship due to the death of the Ward on November 20, 1990 and the pending administration of her estate in Harris County Probate Court No. Three under Cause Numbers 240,625 and 240, 625-401.

This Court overruled and denied all objections to the Court's lack of jurisdiction in an Order signed on April, 1, 1991.

c. Ida Panzer's Subpoenas Duces Tecum served on Joellen Snow, Joseph S. Horrigan, and Lee Head issued on March 12, 1991 and demanding the production of the following:

> "(As to #1 all parts showing income from the practice of law, and expenses relating thereto and income from acting as Guardians, and for ad litem and attorney's fees.)

1. Federal income tax returns for calendar years 1988, 1989 and 1990 (if filed) if not for calendar year 1990 estimated quarterly income taxes paid, declared or filed and

A. Schedule E Supplemental income from partnerships involved in the practice of the law; and

B. Form 1120 if you were a shareholder in a professional corporation for any of the above three calendar years and

C. Your records of income received from the practice of law, and all guardian's fees, ad litem fees and attorney's fees awarded as a result of all court appointments for any of the foregoing appointments and all others during said three year time period above (#1); and

D. Without divulging client's names, addresses or other identities, all other records of income from your practice of law and/or guardian's fees, ad litem fees and attorney's fees received from all other sources including but not limited to judicial appointments, appointments as a result of court orders (if not already including in the preceding) and

E. All time sheets records for services allegedly performed in this file or in this case since August 1, 1990 to date.

F. All records showing the hourly charge for each such service and all other records of hourly charges to private clients and collected and paid by private clients and collected and paid by all other sources including all of the above judicial appointments as ad litems, attorney ad litems, attorney's fees of every kind and guardians in guardianship proceedings including both temporary and permanent guardians;

G. If a member of a partnership, that portion of Form 1065 partnership returns (information returns) showing your portion of fees and the amounts billed and collected and/or distributed to you in each of the three calendar years specified above;

H. If not produced at trial in the above, all other records showing individual and gross billings from private clients and appointments and from all other sources during said three calendar years (with client's names, addresses and other identification deleted) showing gross and hourly billings and collections from the practice of law, and from acting as a Guardian, attorney ad litem, or as other attorney's fees.

I. All records of expenses paid or incurred in the practice of law during said three year time period above, and also

1. All such expenses whether deducted, deductible or not paid or incurred in connection with the production of such income from the practice of law including Guardians and ad litems and attorney's fees enumerated above.

J. All other records kept by you showing the percentages or divisions of fees between those charged private clients and those received for Court appointed attorney's fees, guardian and ad litem fees specified above."

This Court signed an Order Granting the Motions to Quash Subpoenas Duces Tecum filed by Joellen Snow, Joseph S. Horrigan, and Lee Read on June 13, 1991, as to the matters sought by said Subpoenas Duces Tecum, quoted above, except as set forth in said Order.

d. Ida Panzer's Motion to Dismiss, Special Exceptions and Cross-Applicant Ida Panzer's Objections to the Court's Jurisdiction and Subject Thereto, to Application by Guardian Joellen Snow for Authority to Pay Attorney's Fees and Counter and Cross Claim, filed on or or about July 9, 1991, in which it is alleged, inter alia, that Joellen Snow

was grossly negligent in failing to sell some securities owned by the estate.

This Court entered an Order granting Joellen Snow's Motion for Summary Judgment as to Ida Panzer's Counter and Cross Claim on August 23, 1991. The Court further ordered that Joellen Snow recover all costs from Ida Panzer, individually and as independent Executrix of the Estate of Gladys Nelkin, Deceased.

e. Ida Panzer's Cross Motion for Sanctions against Mr. Horrigan Re: His Noticing Deposition of Judge Weldon H. Berry, without Prior Consultation with Panzer's Counsel, filed on or about July 30, 1991 and Panzer's Second Motion for Sanctions Against Joseph Horrigan and His Process Server John Doe, filed on or about August 6, 1991.

This Court denied both motions in full.

f. Ida Panzer's Notice of Intent to Take Oral and Video Deposition of Joseph S. Horrigan, Joellen Snow, Lee Read, Betty Calloway, Esther Steinberg, Dalia Stokes, and Van Wittner filed on or about July 31, 1991, which included a duces tecum requesting production of the following:

> "1. All records including time sheets, billing statements, applications for fees and expenses of MR. JOSEPH S. HORRIGAN, MS. LEE READ and MS. JOELLEN SNOW in this proceeding from August 1, 1990 to date, all other materials furnished to you including but not limited to correspondence from any of the foregoing three attorneys, their employees, agents, or attorneys or representatives.

"2. All records of referrals of client to and from each of the three attorneys named above and agreements documenting or memorializing the same. All existing records of the total of such fee sharing or referral agreements; all records of all fees received by Mr. Van Wittner and Ms. Dalia Stokes, your curriculum vitae, and all other records relating to our expert testimony in this case including all source materials for each of your opinions and all other materials for each of your opinions and all other materials upon which you base any and all of your opinions; all records of your "expertise and past experience."

The Court (Hon. Pat Gregory, presiding) entered a Protective Order, signed August 1, 1991, granting Joellen Snow's Motion for Protective Order and adopting the prior Order Granting Motions to Quash Subpoenas Duces Tecum, entered on June 13, 1991.

g. Ida Panzer's Motion to Recuse or Disqualify Judge filed on or about August 19, 1991, six days prior to the trial scheduled for August 26, 1991 in this cause.

This Court dismissed Ida Panzer's Motion because it was not filed at least ten days before the date set for trial, in violation of Rule 18a, Texas Rules of Civil Procedure.

h. Ida Panzer's Motion to Exclude Expert and Claimants' Snow and Horrigan's Testimony Re Attorney's Fees, filed on or about August 26, 1991 which erroneously cites *Baumann v. Willis*, 721 S.W.2d 535 (Tex.App. -- Corpus Christi 1986, no writ) for the proposition that attorney's fees are not recoverable from an estate under §242 of the Texas Probate Code.

Said Motion was not granted by this Court.

i. Ida Panzer's Objections to Order Granting Motion for Mistrial and Motion to Expunge filed on or about September 3, 1991 which, inter alia, demanded an evidentiary hearing regarding alleged ex parte communications between the Court and Joseph S. Horrigan.

This Court summarily denied said Objections and Motion in open court, on September 3, 1991.

3. That the signatures of Newton B. Schwartz or Ida Panzer, to such papers, constitutes certificates by them that they have read such papers; and that to the best of their knowledge, information and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment.

4. That such papers were signed in violation of Rule 13 of the Texas Rules of Civil Procedure;

5. That statements made by Ida Panzer, Newton B. Schwartz, P.C., and Newton B. Shcwartz (hereinafter collectively called "Respondents") in the Motion to Dismiss, Special Exceptions and Cross-Applicant, Ida Panzer's Objections to the Court's Jurisdiction and Subject Thereto, to Application by Guardian, Joellen Snow, for Authority to Pay Attorneys' Fees and Counter and Cross Claim, (hereinafter called "Panzer's Special Exceptions and Cross Claim"), are in violation of Rule 13 of the Texas Rules of Civil Procedure, in the following respects:

a. The assertion that Ida Panzer had a "prior right" of appointment and/or a statutory presumption of fitness and suitability over Joellen Snow to be appointed

Guardian in this cause violates Rule 13 in that Respondents have ignored their own actions and Statements wherein they expressly agreed to the appointment of Joellen Snow as Permanent Guardian of the Person and Estate of Gladys Nelkin, NCM. Such agreement is documented in an Agreed Order on file in this cause, dated October 10, 1990, and is also found in a transcript of a hearing which took place in this cause on September 24, 1990, a copy of which has been admitted into evidence in connection with this proceeding.

b. Respondents' allegations in "Panzer's Special Exceptions and Cross Claim" to the effect that they seek actual and punitive damages against Joellen Snow for her alleged "gross negligence, negligence and lack of diligence" for allegedly failing to sell 800 shares of the common stock of Consolidated Natural Gas Corporation, and for Movant Snow's alleged failure or refusal "to deliver any and all 1600 of such shares and certificates" to Respondent Panzer, in her capacity as Independent Executrix of the Estate of Gladys Nelkin, Deceased, ignore the actions and statements of the Respondents themselves, whereby Respondents precluded the sale of such stock, after they and Movant Snow had agreed thereto, by filing a Motion to Recuse the Honorable John Hutchison from further action as presiding Judge in this case and, further, Respondents filed Objections to the sale of the securities in question, and obtained a ruling from this Court which deferred any ruling on Movant Snow's Amended Application to sell such shares until Movant's Final Account was approved by the Court.

6. That Newton B. Schwartz, P.C. and Newton B. Schwartz are officers of the Court and should be held to a higher standard than Ida Panzwe in terms of the duty owed the Court system.

7. That Ida Panzer, Newton B. Schwartz, P.C. and Newton B. Schwartz have all violated Rule 13, Rule 18a(h) and Rule 215 of the Texas Rules of Civil Procedure and should be sanctioned accordingly.

8. That Newton B. Schwartz, P.C. and Newton B. Schwartz have a prior history of sanctionable conduct in this cause.

9. That the papers filed by Respondents which contain violations of Rule 12, Rule 18a(h) and Rule 215 constitute burdens on the court system, including the Court's time, and court costs.

10. That Ida Panzer, Newton B. Schwartz and Newton B. Schwartz, P.C. have acted in bad faith.

11. That Newton B. Schwartz, P.C. and Newton B. Schwartz have extensive experience in dealing with the court system.

12. That the degree of willfulness or frivolousness involved herein on the part of the Respondents is serious and high.

13. That the conduct of Newton B. Schwartz, P.C., and Newton B. Schwartz, jointly and severally, is in violation of the Texas Disciplinary Rules of Professional Conduct, and in particular, Rule 3.02 thereof, in that, during the course of this litigation, Newton B. Schwartz, P.C. and Newton B. Schwartz took positions that unreasonably increased the cost or other burdens of the case and that unreasonably delayed resolution of the matter.

14. That Respondents, Newton B. Schwartz, P.C., Newton B. Schwartz, and Ida Panzer should be severely sanctioned for their conduct.

15. That the sanctionable conduct described above is representative of a plan, pattern or course of sanctionable conduct, which includes but is not limited to: (a) the documents expressly set forth above; (b) numerous misstatements as to the law to this Court by Respondent Newton B. Schwartz; (c) numerous misrepresentations as to the facts by Respondent Newton B. Schwartz; and (d) the conduct and statements by Respondent Newton B Schwartz during the voir dire examination of the panel of potential jurors in this cause, which resulted in this Court's granting Joellen Snow's Motion for Mistrial.

16. That Respondents have consistently engaged in said course of sanctionable conduct in this cause, which has been systematically carried on for the purposes of harassment, delay and unjustified increase in the cost or other burdens of this case.

17. That said course of sanctionable conduct has resulted in additional, unreasonable burdens on the Court system, including this Court's time, and court costs.

It is, therefore, ORDERED, ADJUDGED and DECREED that all pleadings, motions and other papers filed in this cause by Respondents, are hereby struck, with prejudice, in accordance with this Court's ruling on September 5, 1991.

In its consideration of the matter of severing and making the subject of a separate proceeding the claims and causes of action heretofore filed in this cause by Ida Panzer as well as Ida Panzer's opposition or objections to the

accountings of Joellen Snow, referred to above, the Court considered, among other things, the following:

1. The causes of action and claims of Ida Panzer against Joellen Snow were heretofore disposed of by this Court in its Order Granting Joellen Snow's Motion for Summary Judgment;

2. Any opposition or objection by Ida Panzer to the accountings, set forth above, has been disposed of by this Court's ruling imposing sanctions against Ida Panzer and her counsel, in this cause, which ruling imposing sanctions struck the pleadings of Ida Panzer, in their entirety.

The Court, have considered such matters, finds that a severance is called for pursuant to Rule 41 of the Texas Rules of Civil Procedure, and that the claims and causes of action of Ida Panzer against Joellen Snow, together with Ida Panzer's opposition or objections to Joellen Snow's accountings, described above, may be severed and proceeded with separately.

It is, therefore, ORDERED, ADJUDGED and DECREED that the claims and causes of action heretofore asserted by Ida Panzer, against Joellen Snow, in her capacity as Permanent Guardian of the Person and Estate of Gladys Nelkin, NCM, as well as Ida Panzer's opposition or objections to the accountings set forth above, all of which relate to the issues resolved through this Court's Order granting Joellen Snow's Motion for Summary Judgment and this Court's Order Imposing Sanctions, be and the same are, hereby severed from this action and made the subject of a separate action.

It is further ORDERED, ADJUDGED and DECREED that the summary judgment heretofore granted in this cause in favor of Joellen Snow, in the Order granting Joellen Snow's Motion for Summary Judgment signed August 23, 1991, is hereby made a Final Judgment, in that it disposes completely of all the issues between Ida Panzer and Joellen Snow, Permanent Guardian of the Person and Estate of Gladys Nelkin, NCM, insofar as Ida Panzer's causes of action or claims against Joellen Snow are concerned, including, but not limited to Ida Panzer's Counter and Cross Claim heretofore filed in this cause.

It is further ORDERED, ADJUDGED and DECREED that this Order Imposing Sanctions against Ida Panzer, Newton B. Schwartz, P.C., and Newton B. Schwartz, is hereby made a Final Judgment, in that it disposes completely of all issues between Ida Panzer and Joellen Snow, Permanent Guardian of the Person and Estate of Gladys Nelkin, NCM, in this cause, other than those issues resolved through this Court's Order granting Joellen Snow's Motion for Summary Judgment, referred to above.

It is further ORDERED, ADJUDGED and DECREED that all matters relating to the issues resolved through this Order Imposing Sanctions be, and the same hereby are severed from this proceeding and made the subject of a separate action.

It is further ORDERED, ADJUDGED and DECREED that this Order for Severance and Order Imposing Sanctions is a final, appealable judgment.

SIGNED this 23 day of September, 1991.

/s/
JUDGE PRESIDING

APPROVED AS TO FORM
AND SUBSTANCE:

HORRIGAN & GOEHRS

By: /s/ Joseph S. Horrigan
JOSEPH S. HORRIGAN
State Bar No. 10012000
1000 Two Houston Center
909 Fannin
Houston, Texas 77010
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CO-COUNSEL FOR JOELLEN SNOW,
PERMANENT GUARDIAN OF THE PERSON
AND ESTATE OF GLADYS NELKIN, NCM

APPENDIX C

0551176 665-26-1025

NO. 237,361

GUARDIANSHIP OF	§	IN THE PROBATE
	§	COURT
GLADYS NELKIN,	§	NUMBER FOUR (4)
	§	HARRIS COUNTY,
NCM	§	TEXAS

ORDER APPROVING ACCOUNT FOR FINAL SETTLEMENT OF TEMPORARY GUARDIANSHIP

On the 6th day of September, 1991, the Account for Final Settlement of Temporary Guardianship and Fist Supplemental Account for Final Settlement of the Temporary Guardianship of GLADYS NELKIN, N.C.M., filed on December 6, 1991 and December 7, 1991, respectively (the "account"), by JOELLEN SNOW, Temporary Guardian of the Person and Estate, were heard and considered by the Court, in a non-jury trial. After examining the account and the vouchers accompanying it, and after hearing all evidence in support of it, there being no exceptions and/or objections, the Court finds that citation has been duly served on all persons interested in the Temporary Guardianship Estate, that the Account for Final Settlement and First Supplemental Account for Final Settlement of Temporary Guardianship have been audited and settled by the Court and should be approved, that no claims have been filed against the Temporary Guardianship Estate, that the Temporary Guardian was appointed Permanent Guardian of the Person and Estate and qualified as such on October 10, 1990, and that there is no further need for administration of this Temporary Guardianship Estate.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Account for Final Settlement of Temporary Guardianship and First Supplemental Account for Final Settlement of Temporary Guardianship be approved.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that JOELLEN SNOW, Temporary Guardian, be discharged from her trust, that FIDELITY & DEPOSIT COMPANY OF MARYLAND, surety on the bond of Temporary Guardian, be discharged from further liability under the Temporary Guardianship bond, and that this Temporary Guardianship be declared closed.

SIGNED this 23 day of September, 1991.

/s/
JUDGE PRESIDING

APPROVED AS TO FORM:

SNOW & WHITWORTH

By /s/ Joellen Snow
JOELLEN SNOW
State Bar No. 18809400
1148 Heights Blvd.
Houston, Texas 77008-6916
713\861-2974
FAX: 713\861-0852

TEMPORARY GUARDIAN OF THE PERSON AND ESTATE OF GLADYS NELKIN, NCM

APPENDIX D

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

February 9, 1996

Mr. Donald H. Cahilly
Shapiro & Watson
1911 S.W. Freeway
Houston, TX 77098

Mr. Newton B. Schwartz
Shapiro & Watson
1911 Southwest Freeway
Houston, TX 77098

Ms. Lee Read
2100 Travis, Suite 175
Houston, TX 77002

Mr. Joseph S. Horrigan
Horrigan & Goehrs
1000 Two Houston Center
909 Fannin
Houston, TX 77010-1003

Mr. Randall S. Lamb
Deakins Kelly Lenox & Lamb
4700 InterFirst Plaza
1100 Louisiana
Houston, TX 77002

Ms. Joellen Snow
Snow & Whitworth
1148 Heights Blvd.
Houston, TX 77008-6916

RE: Case Number 95-0220
Style: IDA NELKIN PANZER and NEWTON B. SCHWARTZ, SR.
v.
BEA NELKIN, JOELLEN SNOW and THE HONORABLE JOHN HUTCHISON

Dear Counsel:

Today, the Supreme Court of Texas denied the above

referenced application for writ of error with the notation "Writ Denied".

Respectfully yours,

JOHN T. ADAMS, CLERK

BY: /s/ Michael C. Murphey,
Michael C. Murphey, Deputy Clerk

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

April 4, 1996

Mr. Donald H. Cahilly
Shapiro & Watson
1911 S.W. Freeway
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Mr. Newton B. Schwartz
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Mr. Randall S. Lamb
Deakins Kelly Lenox & Lamb
4700 InterFirst Plaza
1100 Louisiana
Houston, TX 77002

Ms. Joellen Snow
Snow & Whitworth
1148 Heights Blvd.
Houston, TX 77008-6916

RE: Case Number 95--0220
Style: IDA NELKIN PANZER and NEWTON B. SCHWARTZ, SR.
v.
BEA NELKIN, JOELLEN SNOW and THE HONORABLE JOHN HUTCHISON

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

JOHN T. ADAMS, CLERK

BY: /s/ Michael C. Murphey
Michael C. Murphey, Deputy Clerk

APPENDIX E

EXCERT from:

STATEMENT OF FACTS
August 27 - 29, 1991
Volume I of II Volumes

Let me talk about the other couple of points, and thenn we can have your comments on that. It may be that it's not my role to rule on that, unless, sombody is concerned about it.

The second part on the recusal, I can go back and forth on this. I think in all honesty, if Mr. Horrigan has indicated that he wanted to bring up the fact that there were two different recusals -- I think if that's brought up to sort of show a pattern of conduct, I think that Mr. Schwartz ought to have the opportunity to explain why or what the recusal was filed for.

The thing I don't want to do, though, is get into the filing of this cross action and going back through all of that again, because I don't think that's appropriately before the Court. And I think it's just going to prejudicial.

I think, on the other hand, that certainly you ought to be entitled to comment that, you know, for example, that the purpose you filed the recusal is that maybe you thought the Judge might be a proper witness in another matter, a related matter, pending in this Court or something. I would like imput from you all if you have any further thoughts how to handle this.

APPENDIX F

EXCERPT from

STATEMENT OF FACTS
August 15 - 26 1991
Volume I of IV Volumes

THE COURT: I have heard your two sides on that. So, I will rule. Number 3, any mention or comment about Ida or Irving Panzer or their counsel being Jewish. While this is in the record of this case, it is so only in the context of her mother being institutionalized in the "Seven Acres Jewish Home for the Aged," erroneously referred to as the "Jewish Home for the Aged." Any comment on that, Mr. Schwartz, or any objection, Mr. Horrigan?

MR. SCHWARTZ: I think it speaks for itself, Your Honor. While that can't be kept out of the case that's in Judge Scanlan's Court, it should be kept out purely on the issue of attorney fees, which is an issue here.

MR. HORRIGAN: Your Honor, we can't ignore the fact that Ida Panzer is Jewish. One of the things that they have accused Joellen Snow of doing wrong is conversing with a relative of Gladys Nelkin about the Hebrew wording on her tombstone, the inscription, which was to be put in Hebrew.

Now, I am sorry, but I don't think the jury is going to buy the proposition that Ida Panzer isn't Jewish if she wants a Hebrew inscription on the tombstone. We can't ignore the fact that Gladys Nelkin was in a facility called the Seven Acres Jewish Home for the Aged. We can't eradicate the word, "Jewish." I don't understand the concern. What

is the concern with making reference to Mrs. Panzer's and Mrs. Nelkin's heritage?

MR. SCHWARTZ: Your Honor, counsel will note that, but I want to advise the Court if it's not familiar with, which I am sure Your Honor is, this being in the record -- this Court must follow the Leesville Case from the U.S. Supreme Court of June 15th of this year, and Batson v. Kentucky.

There is a subsequent 1991 Supreme Court case that says when members are of one minority, religious or ethnic; that they cannot strike jurors. And that this gives us standing that that's going to invoke the whole Leesville case out of Louisiana. I am sure the Court is familiar with it. If not, I will hand the Court a copy from last week. It's June 3rd of this year. And then, the Texas Supreme Court adopted it on June 12th in a pending case from Corpus Christi and summarily reversed.

The case simply indicates the "Batson" Rule, which is only applicable in criminal jury selections; has become applicable under due process to all civil procedures in all courts. If there was any doubt of it being limited to Federal Courts, the Leesville case and the Texas Supreme Court on June 12th of this year -- I am sorry. I don't know the name of the case. It was out of Corpus Christi. It said when a party is of a minority race, religion or ethnic group, it triggers the requirement and the restricting of jurors of any minorities, such as black, Hispanic, etc. That's going to trigger that, and that's one relevant subject.

I am not at all ashamed of it or in any way trying to keep it out. But I have a client that makes the final calls, and her lay perception may be more accurate than mine. I have represented many Jewish people. "Lehmann v.

Highland" went all the way to the Supreme Court. Perhaps in some cases it has come against it. Anyway, one definite effect is we're under the "Leesville" rule. And if the Court isn't familiar with it, before we voir dire the jury on the 26th -- I am sure the Court is by now familiar with that. It's a six to three decision. The minority very simply said it's reprehensible but not unconstitutional to strike minority members of a jury, but the nine to nothing decision saying that you don't have to be a member of the same class to object to striking of any minority class, which is a criminal case out of Ohio this year by the U.S. Supreme Court, which makes it clear that it prohibits more than their striking Jewish jurors.

MR. HORRIGAN: I an going to save the time of the Court and shut up. I don't understand what he is talking about.

THE COURT: All right. Number 4, any mention of the Court approved contingent fee arrangement and contract approved by the Honorable Jim Scanlan in Probate Court No. 3 in the decedent's estates's claims for the return of her homestead and furnishings allegedly fraudulently obtained from her while she was N.C.M.

MR. SCHWARTZ: That speaks for itself, You Honor.

MR. HORRIGAN: Your Honor, the contingency fee contract is a matter of public record. Mr. Schwartz made it such by filing it in Judge Scanlan's Court in Gladys Nelkin, Ddeceased, Estate. It's a matter of public record.

The other think I would say is that that point is relevant to the issue of harassment here in running up our fees. The point being that Mr. Schwartz, by virtue of his

contingency fee contract with Ida Panzer, Ida Panzer has therefore, I gather, a free ride in this case, as far as, Mr. Schwartz's services are concerned. All she had to do is see how high she

APPENDIX G

EXCERPT from

ADDENDUM TO STATEMENT OF FACTS
AUGUST 27, 1991

Good morning. I am Judge Bill McCulloch, Judge of Probate Court No. 4 of Harris County. Today we are here to try a lawsuit involving an Estate. The parties have requested a jury trial and that is why you are here.

The right to a trial by jury of impartial peers is inherent in our system of justice. It is my understanding that jury trials date clear back to the time of Christ. In fact, in early Greece juries consisted of 201 people and to qualify for a jury you had to be at least 60 years of age.

APPENDIX H

EXCERPT from

STATEMENT OF FACTS
August 27 - 29, 1991
VOLUME I OF II VOLUMES

Excerpt From
VOIR DIRE EXAMINATION
BY MR. HORRIGAN

- is a woman named "Annie Hirsch." Nobody knows Mr. "Hirsch"?

THE JURY PANEL: (No response)

MR. HORRIGAN: Mrs. Nelkin resided in her final days in a geriatric center here in Houston, called the Seven Acres *Jewish* Geriatric Center. Does that ring any bells? Has anybody ever had any personal experience with Seven Acres; any friends or relatives either working there or spent time there or lived there?

MR. SWARTZ: Your Honor, may we approach the Bench with the court reporter on a matter of a motion?

THE COURT: Yes.

MR SCHWARTZ: Your Honor, I didn't want to call any particular attention to it, but he inserted the word, "Jewish" in there, and I understood you granted our motion to keep that out of evidence. And I want to move for a mistrial.

I hesitate to ask this early on, but that's a clear violation of not only the rule, but also the recent "Batson"

decision. And I am going to move for a mistrial and start over at this earliest point since we're just 20 minutes in the case because it's just an obvious violation. I didn't object to geriatric but to mention "Jewish" is a violation.

MR. HORRIGAN: Your Honor, I can't take away the name of the organization. I believe the Court's rule was that I would make no reference to the fact that Mrs. Panzer is Jewish, and I do not intend to make any reference to that.

But we have witnesses coming in from that very institution, who work there. They have to identify themselves. They have got to say where they work. They can't lie.

MR. SCHWARTZ: They don't have to use that word in there. Seven Acres will do. The jury -- any of them know what it is and can qualify that. He did not have to purposefully insert it.

THE COURT: I was thinking the Motion in Limine was just for Mrs. Panzer and Mr. Schwartz.

MR. SCHWARTZ: If Ida's been identified as her daughter, they will know. And I stand by my motion, because --

THE COURT: You have made your motion. I will overrule it.

APPENDIX I

EXCERPT from

STATEMENT OF FACTS
August 27 - 29, 1991
VOLUME II OF II VOLUMES

THE COURT: I believe, we had a motion regarding Juror No. 2 and 12?

MR. SCHWARTZ: As to No. 2, we're entitled under the Edmondson v. Leesville Concrete and we're entitled under Powers v. Palacious -- on the record, they have the burden of showing that their striking of her was a race neutral explanation, and the same would apply to their striking of -- I don't know if the case applies to all matters. But I will go ahead and make it anyway -- to No. 19, Rachael Hernandez, a Latin American female, Your Honor.

MR. HORRIGAN: May I see the case, Mr. Schwartz? I just want to check who's got the burden here.

MR. SCHWARTZ: We have only the initial burden to show that two of their strikes were directed to a Negro and a Latin American female, respectively. Whether they're male or female is immaterial, but No. 2 is of the Negro race and No. 19 is of the American Chicano or Latin American race. And we say that on the basis -- particularly starting with No. 2, Your Honor, that there is no sound basic difference. The only think that I have showing is that this juror told us -- she was not questioned at the Bench -- is that she served as a juror on a civil case, a slip and fall case, and a wife died. There was an insurance claim. She has made no other remarks on the form, other than that.

Her husband is an employee of Sears. She lives on Doulton, which is off of Martin Luther King Drive in Southeast Houston. The burden shifted to them to give a race neutral explanation, Your Honor, as to why they struck her. As a matter of law, Mrs. Panzer is doubly so because of being Jewish, even if we weren't under Edmondson v. Leesville Concrete as enforced by The Texas Supreme Court in Powers v. Palacious, a copy of which has been filed and served in this case.

They have the burden of supplying a racial neutral explanation for striking that juror and for striking No. 19, Rachel Hernandez.

Hernandez, it is true that she was questioned at the Bench about some petty attorney fees problem of a $150 from a friend of hers who became a lawyer, who refunded it and an experience about her brother paying a lady lawyer $500. And the money did not come back.

And particularly, as to No. 2, we know of no basis for striking this juror, other than, her race. And particularly, the context of this case, where our expert, Judge Weldon Berry, is black -- unless, they have done some investigation that is not of record. All I know is what's been brought out in the public record before Your Honor yesterday and today.

There is no race neutral explanation for stiking; only that they're using a preemptory challenge to exclude a juror on account of their race, violating the equal protection rights of Mrs. Panzer, as well as the juror. And the exercise of these preemptory challenges was pursuant to a State Court action, since we're obviously here in State Court.

They have the burden of establishing a *prima facie* case. We have established a *prima facie* case by those facts, Your Honor, that two of their four strikes in this case have been to racial minorities.

MR. HORRIGAN: Your Honor, I would tender to the Court the 1991 case cited by Mr. Schwartz. This is a United States Supreme Court case, 1991, Edmondson v. Leesville Concrete. I don't believe that Mr. Schwartz's statement, as to the burden of prood in this case, is an accurate statement to the Court. What the Supreme Court there did was remand the case for a determination of whether the plaintiff in that case has established a *prima facie* case of racial discrinimation, such that the defendent would then be required to offer race neutral explanations for its preemptory challenge.

I have no problem at all in testifying for this Court that our decision to strike Juror No. 2 was not race motivated. But I think the burden is upon Mr. Schwartz to put on some evidence. So far, all he has done is put on oral argument. The burden of proof is upon him to make a *prima facie* case.

MR. SCHWARTZ: Your Honor, there is the additional statistical fact that she was, to my knowledge, unless I stand corrected or didn't observe the jurors correct in my notation -- the only black on the whole panel. Is that correct?

THE COURT: Yes.

MR. SCHWARTZ: While there was another Latin American male, who was not reached because of being No. 25. Mr. Delagarza, Jr., was not reached because of being that far down the list.

So, we have a pattern of striking the only black and the only Latin American within the striking range, Your Honor. That's a statistical presumption. It shifts the burden to them.

The remedy is either to impanel another jury, which may be a harsh remedy in this case, as the Judge did in this building in June, before The Supreme Court of Texas had ruled that, after the Federal case and restated the three black jurors that were struck in that case and ordered them not struck. The reason being, counsel was going to strike all three blacks on the panel. He was not going to keep re-impaneling jurors, until you get an all white panel.

THE COURT: What I need to do is go back and read this case, and I will come back with my ruling. And we will see what testimony needs to be given.

(Brief recess)

THE COURT: It does provide *prima facie* evidence of racial discrimination has to be established before the other party is required to offer an explanation. And it goes on to say when a *prima facie* case has been established, required consideration of all relevant circumstances, including that there's been a pattern of strikes against members of a particular race -- and then, when you are hoping they might give you some guidelines, they say that this applies to the civil courts and the trial courts to figure it out.

Since I am going to have to develop my own guidelines, Mr. Schwartz has made, I believe, in his comments, the reason he thinks he has made a *prima facie* case is that two of the strikes were used against minorities.

And also, the fact that, at least, from the questions asked, he didn't see any reason that she ought to be excluded.

At least, for purposes of moving ahead, I am going to say that he has, at least, raised some evidence. So, if you have got a response, I think that would be the easier way to try to deal with it.

MR. HORRIGAN: Could I be sworn, Your Honor?

(Whereupon the witness was sworn in at this time.)

MR. HORRIGAN: My name is Joe Horrigan. I'm attorney-in-charge in this case, representing Joellen Snow, who is also, my co-counsel. As attorney-in-charge, it was my decision to determine which jurors to strike and which jurors not to strike in exercising our preliminary challenges in this case.

One of the four jurors that I struck after Judge McCulloch had exercised or had granted challenges for cause, was Betty Smith. I did not strike Ms. Smith on the basis of her race or her color. And on that score, I would point out that one of the jurors that I did not strike was a woman named Carmel Lowe, whose place of birth is listed as Jamaica in the West Indies. Ms. Lowe is, obviously, a minority.

I would also point out that I have no reason whatsoever to strike anyone because of their race. This goes back a long way with me. As a law clerk for the Honorable Judge Thornberry, from the period of 1964 to '66, I found myself as a young lawyer in the middle of a civil rights movement. Started out with Judge Thornberry when he was a Federal District Judge. Judge Thornberry was a Democrat

appointed to that Bench by President Kennedy. He was later appointed to the Fifth Circuit Court of Appeals by President Johnson. I learned a great deal from Judge Thornberry. He was one of the shapers of my beliefs today.

When I worked for Judge Thornberry, one of my jobs was to draft opinions for him in connection with his work in dealing with civil rights cases, throughout the cases that encompassed the Fifth Circuit.

I drafted the opinion that declared the Texas Poll Tax unconstitutional. That Poll Tax was found to be unconstitutioal on the grounds that it discriminated against blacks and other minorities. I drafted the opinion that found the Lousiana Grand Jury System to be unconstitutional. The basis for that opinion was that blacks were being systematicallyt excluded from the Grand Jury Service in the State of Louisiana.

I have a receptionist and two secretaries in my office. The receptionist is black. One of the two secretaries is black. I have an Office Manager in my office, a woman who has been working for me for over 27 years. Her name is Dora Thomas. She is black. I am personally offended by Mr. Schwartz's accusations. I can assure this Court that I did not in any way, shape or form, strike Betty S. Smith because she is a black woman.

MR. SCHWARTZ: May I take him on cross, Your Honor?

THE COURT: Yes.

CROSS EXAMINATION BY MR. SCHWARTZ
OF JOSEPH HORRIGAN

Q. Mr. Horrigan, on about June 30 of 1977, you were either an associate or member of the, then, firm of either, "Dyche or Wright, King, Sullivan" --

A. Bailey and King.

Q. On or about that time, isn't it correct that Mr. Tony Sadberry was proposed to be made a partner in that firm, and Mr. Dyche and Wright vetoed that?

A. That is not correct.

Q. Tell us what is?

A. I will. Mr. Tony Sadberry, was a black man and was proposed as someone that the firm would hire as an associate. Mr. James Wright initially opposed that choice, and it caused a rift in the firm. At that time I was managing partner of that firm.

After the feelings on the matter crystalized, I went to Mr. Wright myself, personally, and told him I thought he made a big mistake. I told him that I thought it was all wrong. His explanation was to me that he represented -- he did a lot of work for large corporate clients that relied upon him. Tony Sadberry was becoming a trial lawyer in that firm. Mr. Wright worked for large corporate clients, and he was concerned that his clients -- this was back in --

Q. '77?

A. '77 -- might not be receptive to Mr. Sadberry as their trial attorney. I told him that that was no way to

exclude somebody; that if Tony Sadberry had the qualifications, that we should hire Tony Sadberry.

Wright changed his mind; issued a memo to that effect to the entire firm. And based on my recommendation, went along with the proposition that we should hire Tony Sadberry.

By that time, the rift in the firm had grown wide. There were other issues in the matter before Tony Sadberry, other than Tony Sadberry. The rift continued. The issues grew. The hostilities grew, and the firm ended up dissolving. But the firm did not dissolve over the fact that Wright would not hire Tony Sadberry because I talked him into offering him a job.

Q. How about Mr. Dyche? He was also opposed to Mr. Sadberry being brought into the firm because he was black, Mr. Dyche being the senior partner of Dyche and Wright?

A. I don't recall. It was Mr. Wright, rather than Mr. Dyche that expressed to me reservations with Mr. Sadberry.

Q. Isn't it correct that six lawyers or at least, the following, John King, Charley Sullivan, and Mr. Sabon, whose first name I don't know --

A. Robert T.

Q. -- Robert T. Sabon. And Mr. Sadberry and perhaps, one or two others departed the firm?

A. That is a fact.

Q. And that Mr. King has represented to me, within the last thirty days, that it was solely because of Mr. Dyche's or Mr. Wright's refusal to make him a partner there?

A. It had nothing to do -- the two, were not al all related. They were incorrect.

Q. There's no cause and effect whatsoever between Mr. Sadberry being black and these men leaving the firm?

A. Mr. Wright issued a memorandum to everyone in the firm, including Mr. King, rescinding his prior reservation to Mr. Sadberry, Mr. Schwartz.

Q. Had the six people left by the time that memorandum came about?

A. They had not.

Q. And the date I was given, I think, was June 30th. I know you can't fix that particular date in your mind.

A. No, I can't. That was a number of years ago.

Q. And you did remain in the firm after the split?

A. I did, as did eight others. I believe the split, when it occurred, there were 17 or 18 of us. My memory is that six left.

Q. The rest stayed?

A. The rest stayed. More stayed than left.

Q. Among those that left, was Mr. anthony Sadberry, the black lawyer?

A. Mr. Sadberry was never a partner of the firm. So, he couldn't have left.

Q. He was never fired? He did not go with the new firm of Sullivan, King?

A. After they left, he went with that firm.

Q. Was there litigation or arbitration or any dispute involving the split-up, the financial split-up of the assets, dividing the clients?

A. Yes.

Q. Was it litigated or was it arbitrated?

A. Neither one. It was settled.

Q. Without third party intervention?

A. That's correct.

Q. And your testimony, as far as you believe, the six lawyers who left did not leave over the exclusion of Anthony Sadberry as a prospective employee or associate because he was black?

A. As far as I know, they did not. I don't see how they possibly could have, since the memorandum had been circulated to each one of them, saying that Mr. Wright no longer took that position.

Q. And none of the eight or none who remained -- you said there were 18. None of those were black or minorities, were they?

A. Everyone in the firm was white. Every attorney in the firm was white. At that time my personal secretary was a colored woman, Ms. Thomas, who was black.

Q. You have mentioned that she's been with you 20 years? So, I gather, since you have just been a lawyer 27 years, she's been with you the last 20 years continuously throughout your career, right?

A. Actually, there was one year that Ms. Thomas decided that her children would be better off in Austin and left and went to work for -- well, it's a large firm in Austin, "McGinniss, Lockridge, M-C-G-I-N-N-I-S-S, L-O-C-K-R-I-D-G-E." I called a friend of mine with "McGinniss, Lockridge" and she made the decision she was going to leave. And I found her a job at McGinniss, Lockridge.

After that year, she decided to come back to Houston, called me, and I rehired her. And she's been with me to this day.

Q. And the Dyche and Wright firm after the split, never hired a black lawyer, did it, until you left in '82 to go with Armogida and Coats?

A. I believe I left December, 1981. No, they didn't hire a black lawyer.

Q. Or a Latin American or a minority lawyer?

A. No.

Q. No Jewish lawyer that you know of?

A. Yes.

Q. They did? Who was that?

A. Let me think, Mr. Schwartz, if I can recall his name. I do know that he did hire a Jewish lawyer. Le me think. He came with the firm shortly before I left, and I cannot recall the gentleman's name.

Q. Came as an associate, I take it? Or new employee; not partner level?

A. No.

Q. Any woman hired in the firm?

A. Oh, yes.

Q. There were women before and after the split?

A. Yes.

Q. Can you tell me their names?

A. Yes.

Q. Please, do so.

A. Mary Madden, M-a-d-d-e-n, who is now a bankruptcy judge or does a lot of work in bankruptcy.

Q. Was she a partner or an associate?

A. She was an associate. Suxanne Douglas, who was an associate. "Lucretia Tate."

Q. Was this all or before this '77 re-division of the firm?

A. Ms. Tate, and Ms. Madden, I think, were with the firm before the split and remained with the firm -- no. I take it back. Ms. Madden, I believe went with Mr. King's group.

Q. Sullivan, King?

A. Yes. MsTate remained with our group. I can't remember whether MsDouglas was with the firm or not, and there may be other women lawyers besides these three.

MR. SCHWARTZ: Your Honor, I have no further questions about her. I do go to Rachel Hernandez, No. 19, a Latin American female. And I would confess, only as to No. 3, Carmel Lowe, who was born in Jamaica, West Indies, because she's slightly dark-complected -- Mrs. Panzer and I can't agree on what her nationality is. I don't want to take that as admitting that she's some distinct minority.

THE COURT: Apparently, Mr. Horrigan feels she is.

MR. SCHWARTZ: He is entitled. I have an employee in our office from the West Indies, who is considerably darker.

THE COURT: In honesty, if we're looking at the bias of Mr. Horrigan, it's more important for me to know

what he thinks she is, than what you think she is. I don't want to keep the jury out there all night. We can go on about what happened in all of our histories. I am not belittling that. I am getting sympathetic to the jury.

I think you have raised a point about Ms. Lowe, feeling she is a minority, and you didn't object to her. And of course, your history, what you think, shows your lack of personal bias against minorities. I want to be sure I am getting your point. Have you stated any race neutral reason for excluding either of these people?

MR. HORRIGAN: I will be happy to. As to Ms. Smith, Ms. Smith is a clerk in Ben Taub Hospital. She had served on a civil jury before. The dollars involved here, insofar as the amount of attorney fees that we're seeking, particularly in light of Mr. Schwartz's comments to the jury during the voir dire, caused me to think that someone from a lower socio-economic status would be less desirable juror from out standpoint, than someone from a little higher socie-economic status.

I might point out that we had some of the same concerns acout Juror No. 1, Kathleen Miles, who is listed as unemployed. The reason that we did not strike Ms. Miles was because during the voir dire when we were talking about experiences with nursing homes, Ms. Miles made the statement that it was a very rewarding experience for her to take care of a relative; see them through in difficult times. I found that to be a significant factor in choosing her, in spite of her, what I perceive to be, a lower socio-economic status than I deem desirable or preferable.

Let me say, with respect to the panel in general --

THE COURT: What about Ms. Hernandez?

MR. HORRIGAN: Ms. Hernandez came to the Bench during voir dire, and she indicated that she had worked for someone who later became an attorney. And she used that person after they became an attorney to sue a friend for taking her personal property. She indicated that she had given that person a $150 retainer and that that attorney would not do anything at all. She finally got the retaineer back one year later.

She stated to the Court that she had a twin brother who paid a female attorney, like Ms. Snow, $500 to do work on some tax matters. This female attorney did nothing. Two years ago that happened.

And based on her experiences with attorneys, I felt that it was not in Ms. Snow's best interest to utilize her as a juror.

MR. SCHWARTZ: Your Honor, may I make one very brief reply as to No. 2. If I wrote down the response correctly in the case, she was the juror with the slip and fall, where the wife died. I was writing down these disassociated facts. They awarded $200,000 which is, for a slip and fall, Your Honor -- they're the dredges of liability cases. And that's a very substantial award and almost coincides with the amount in controversy in this whole Estate. So, it's not a minority.

THE COURT: As I understand the law, a preemptory challenge does not have to rise to the level of a challenge for cause, assuming that the burden is met. To show his opinion, he gave me a reason. Unless the burden is met on the first part, a *prima facie* case for racial discrimination -- to be honest with you, in light of Ms. Lowe being on the jury, and Mr. Horrigan's testimony that he felt that she was a minority, I am not sure it's reached that.

But I think he has given reasons that they are not race related, as to reasons for excluding them. So, I am going to hold that his preliminary strikes are not race related. And therefore, I will let it stand. You certainly have your right and can make your exception.

MR. SCHWARTZ: I appreciate that, Your Honor.

APPENDIX J

0534778 664-24-1040

NO. 237,361

IN THE MATTER OF	)(	IN THE PROBATE
THE ESTATE	)(	COURT NO. FOUR (4)
OF GLADYS NELKIN	)(	HARRIS COUNTY,
N.C.M.	)(	TEXAS

IDA PANZER'S FIRST MOTION FOR A MISTRIAL,*

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now IDA PANZER and renews her First Motion for a Mistrial, * or in the alternative an instruction to the jury concerning the statement of Joseph Horrigan made to the jury at the outset of jury voir dire concerning Gladys Nelkin being treated at "*Seven Acres **Jewish** Geriatric Center*" for a period of years. The Court denied a timely Motion for Mistrial, ruling that the Motion in in Limine, which the Court granted and sustained, covered only Ida Panzer and Newton B. Schwartz, her attorney. The Court erroneously narrowly construed said injection of religion into this case at its outset, disregarding the Motion in Limine which covered "directly or indirectly" mentioning that the Panzers' are Jewish. **

* Made at the conclusion of the remarks mentioning the Seven Acres **Jewish** Geriatric Center and herewith renewed in writing.

** Or their counsel, the clear import being injecting the Jewish religion into this proceeding, explicitly and implicitly. Jews are a protected religious minority being fewer in number than Muslins in the United States.

This blatant violation of the letter and spirit of such Motion has tainted the entire jury panel. It could easily have been cured by ordering a new panel of jurors and starting over. Now this entire panel is irrevocably tainted by the injection of the religion of Ida Panzer's mother, and presumably hers, into this case. It is as much a volation as Mr. Horrigan telling the jury that her husband is Jewish, a matter not literally covered by the granting of the Motion in Limine, but obviously within the spirit.

I.

Prior to the jury voir dire, counsel for IDA PANZER has introduced as a part of this record the U.S. Supreme Court decision in *Leesville*[1] and the Texas Supreme Court decision on June 12, 1991 following it[2] nine days later, and citing another 1991 U.S. Supreme Court case from Ohio holding taht a person who is not a member of that particular racial or religious minority, i.e. a white male had standing to urge *Batson v. Kentucky*,[3] the progenitor of all of these decisions. *Leesville* ante. made it applicable to civil cases. Finally Panzer's counsel made available to the Court and all counsel prior to the jury voir dire an extract of the recent Fifth Circuit Court of Appeals[4] decided on August 13, 1991 holding, inter alia, that in a criminal prosecution in Dallas, Texas Federal Court (Judge Barefoot Sanders Northern District of Texas) that Judge Sanders properly prevented defendants' counsel from inquiring of prospective jurors, or

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[1] *Edmonson v. Leesville Concrete Co.*, 111 S.Ct. 2077 (1991)

[2] *Powers v. Palacios*, Vol 34, The Texas Supreme Court Journal, 651 (Sup June 12, 1991)

[3] 476 U.S. 789 (1986)

[4] *U.S. v. Greer, et al*, No. 90-1348 (5th Cir. ___F2d___(Aug 13, 1991); Texas Lawyer August 26, 1991 copy attached

having the Court do so, the religion and particularly whether any venire person was Jewish. It again is attached hereto marked exhibit A and made a part hereof for all purposes the official opinion not yet being published or available on this short notice from the Clerk of the Court in New Orleans Louisiana).

II.

There, as here, the alleged victims (Glady Nelkin here) were Jewish. No good came from the Court's granting said Motion in Limine while at the first opportunity before the jury panel, Mr. Horrigan violated it knowingly and intentionally. It is no excuse or defense that he did it indirectly as the name of the institution where Gladys Nelkin was an inpatient or 'guest' for more than seven years (1983-1990). Jurors are not imbeciles. They know that Jewish people are treated in Seven Acres *Jewish* Geriatric Center (all emphasis added).

Such direct and immediate violation of this Court's own ruling on Panzer's Motion in Limine should be the basis for

1. The granting of the mistrial prayed for in open Court at the time of the making of said remarks, at the end of the statement so as not to interrupt counsel or call the jury panels attention to it, at the Bench conference duly recorded; and

2. imposition of appropriate sanctions under Rule 215a T.R.CIV. P. and

3. only if #1 above is again denied, a statement to the jury panel that the race, religion or creed of Mrs. Gladys

Nelkin[5] is not in issue herein (not specifically calling their attention to or repeating that she is Jewish or the Jewish in the name of the Geriatric Center) before this or any other witness during the trial or in further jury voir dire.

If this general statement is not ordered, none other is desired that repeat the impermissable racist bigoted injection by Mr. Horrigan into this case. It is he who urged the Court that questioning the jury about their views on Jews was the proper procedure. While rejecting this, the court has permitted Mr. Horrigan impermissable to do indirectly what he cannot do or should not be able to do directly under all of the above case.

Ida Panzer again requests that the Court instruct counsel for SNOW, Mr. Horrigan, that any repeat of or injection of religion, particularly Mrs. Melkin; Mr. Panzer; Mrs. Panzer' or their counsel; or any of the other witnesses in this case, be instructed not to mention further *Jewish, Jews* or speaking Yiddish (a slang form of Jewish and Hebrew) on the penalty of granting a mistrial herein and imposition of sever sanctions against Mr. Horrigan and Ms. Snow.

Respectfully submitted,

/s/

NEWTON B. SCHWARTZ

SCHWARTZ BERGER & VALDEZ INC.
ATTORNEY FOR IDA PANZER
#325 723 Main
Houston, Texas 77002
2244161 SET# 17869000

---

[5] Or anyone else in this case, again not mentioning specifically Jews or Jewish.

CERTIFICATE OF SERVICE
& OF CONFERENCE

Prior to the recommencement of jury voir dire after adjournment, on this 28th day of August 1991 in the afternoon in open Court in the Courtroom of Probate Court #4, I personally served a true copy of this Motion upon both Mr. Horrigan and Ms. Snow with the request that if they did not oppose it, to notify the Court at the hearing thereon to satisfy Rule 11 R.R.Civ.P. Otherwise it is presumed to be opposed by their silence after its receipt.

/s/
NEWTON B. SCHWARTZ

cc Hon Anita Rodeheaven Probate Clerk
cc Court unit of Judge McCulloch

APPENDIX K

OFFICE OF ANITA RODEHEAVER, COUNTY CLERK
HARRIS COUNTY, TEXAS

PROBATE COURTS DEPARTMENT
(Left Column)

JURY LIST
Docket No. 237,361
In the Probate Court No. 4, of Harris County
Texas

August 27, Term, 1991

Style of Docket: IN RE: IN THE GUARDIANSHIP OF GLADYS NELKIN

FILED
AUG 30 10 32 AH '91
/s/ Anita Rodeheaver

/s/
JUDGE, PROBATE CT. # 4

OFFICE OF ANITA RODEHEAVER, COUNTY CLERK
HARRIS COUNTY, TEXAS

PROBATE COURTS DEPARTMENT
DOCKET NO. 237,361
STYLE OF DOCKET: GLAYDS NELKIN, N.C.M.

(Right Column)

JURY LIST

~~1. Kathleen Milee~~
~~2. Betty G. Smith~~
1. Carmel P. Lowe
~~4. Waneta Carnell~~
2. James G. Kovacik
~~6. Robert G.Clanina~~
~~7. Petey D. Cooper~~
3. R.C. Burns
~~9. Laurie M. Hafely~~ Cause
4. Tom C. Schatz
~~11. Nancy D. Goodard~~
~~12. Sheila t. Massey~~ Cause
~~13. Ming Y. Lee~~ Cause
~~14. Robert M. Bowerman~~ Cause
5. Margaret S. Griffin
6. Barbara M. Comee
~~17. Richard A. Gement~~
1A E. L. Schrock
~~19. Rachel Hernandez~~
~~20. Richard B. Duren~~ Cause
2A. Jacqueline S. Solley
22. Billie M. Gibson
23. Lynn L. Evans
24. Hal L. Southerland
25. Emilio Delagarza
26. Donna E. Fowler
27. Paul H. Camerlengo
~~28. Peggy G. McCullough~~ Cause

(Left Column)
OFFICE OF ANITA RODEHEAVER, COUNTY CLERK
HARRIS COUNTY, TEXAS

PROBATE COURTS DEPARTMENT

JURY LIST
Docket No. 237,361
In the Probate Court No. 4, of Harris County
Texas

August 27, Term, 19 91

Style of Docket: IN RE: IN THE GUARDIANSHIP OF GLADYS NELKIN

Filed on _____, 19___

/s/ Joseph Horrigan

(Right Column)
OFFICE OF ANITA RODEHEAVER, COUNTY CLERK
HARRIS COUNTY, TEXAS
PROBATE COURTS DEPARTMENT

DOCKET NO. 237,361

STYLE OF DOCKET: GLADYS NELKIN, N.C.M .

(Left Column)

JURY LIST

1. Kathleen Miles
~~2 Betty S. Smith~~
1. Carmel P. Lowe
4. Waneta Carnell
2. James G. Kovacik
~~6 Robert C. Glanina~~
7. Patsy P. Cooper
3. R.C. Burns
9. Laurie M. Hafely
4. Tom C. Schatz
~~11. Nancy D. Goodard~~
12. Sheila J. Massey
13. Ming Y. Lee
14. Robert M. Bowerman
5. Margaret S. Griffin
6. Barbara M. Comee
17. Richard A. Gement
18. E.L. Schrock
~~19 Rachel Hernandez~~
20. Richard E. Duren
21. Jacqueline S. Solley
22. Billie M. Gibson
23. Lynn L. Evans
24. Hal L. Southerland
25. Emilio Delagarza
26. Donna E. Fowler
27. Paul H. Camerlengo
28. Peggy G. McCullough

(Right Column)
OFFICE OF ANITA RODEHEAVER, COUNTY CLERK
HARRIS COUNTY, TEXAS
PROBATE COURTS DEPARTMENT

JURY LIST
Docket No. 237,361
In the Probate Court No. 4 of Harris County
Texas

August 27, Term, 1991

Style of Docket: IN RE: IN THE GUARDIANSHIP

OF GLADYS NELKIN

/s/

Filed on 8-28, 1991

ANITA RODEHEAVER, CLERK
Probate Court No.
Harris County, Texas

/s/

(Right Column)
OFFICE OF ANITA RODEHEAVER, COUNTY CLERK
HARRIS COUNTY, TEXAS

PROBATE COURTS DEPARTMENT

DOCKET NO. 237,361

STYLE OF DOCKETS: GLADYS NELKIN, N.C.M.

JURY LIST

~~1. Kathleen Miles~~ 1
2. Betty S. Smith
1. Carmel P. Lowe
~~4. Waneta Carnell~~ 2
2. James G. Kovacik
6. Robert G. Slanina
~~7. Patsy P. Cooper~~ 3
3. R.C. Burns
9. Laurie M. Hafely
4. Tom C. Schatz
11. Nancy D. Goodard
12. Sheila J. Massey
13. Ming Y. Lee
14. Robert M. Bowerman
5. Margaret S. Griffin
6. Barbara M. Comee
~~17. Richard A. Gement~~
18. E.L. Schrock
19. Rachel Hernandez
20. Richard E. Duren
21. Jacqueline S. Solley
22. Billie M. Gibson
23. Lynn L. Evans
24. Hal L. Southerland
25. Emilio Delagarza
26. Donna E. Fowler
27. Paul H. Camerlengo
28. Peggy G. McCullough

APPENDIX L

0537256 664-27-1836

NO. 237,361

GUARDIANSHIP OF	§	IN THE PROBATE
	§	NUMBER FOUR (4)
GLADYS NELKIN,	§	HARRIS COUNTY,
NCM	§	TEXAS

ORDER GRANTING MOTION FOR MISTRIAL

On the 28th day of August, 1991, came on to be heard the Motion for Mistrial of Joellen Snow, Permanent Guardian of the Person and Estate of Gladys Nelkin, N.C.M., seeking a mistrial of the trial of this cause which began on August 27, 1991, and the Court, having reviewed the record of the voire dire in this cause, and having heard the argument of cousel, finds as follows:

1. At the voire dire of the jury panel in this cause, Newton B. Schwartz, counsel for Ida Panzer, repeatedly exceeded the bounds of proper voire dire examination over objection of counsel for Joellen Snow.

2. Newton B. Schwartz repeatedly mentioned matters otherwise inadmissible in evidence.

3. The statements made and questions asked by Newton B. Schwartz were desired to instill in the jury prejudice against Joellen Snow.

4. The statements made and questions asked by Newton B. Schwartz were so prejudicial to Joellen Snow that they could not be cured by instruction from the Court.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the trial of this cause which began on August 27, 1991, is hereby declared to be a mistrial.

It is further ORDERED, ADJUDGED and DECREED that, subject to the disposition of the Supplemental Motion for Sanctions filed herein by Joellen Snow, the trial of this cause shall continue from day to day until completed.

SIGNED this 30 day of August, 1991.

/s/
Judge, Presiding

APPROVED AS TO FORM
AND SUBSTANCE:

HORRIGAN & GOEHRS

By: /s/ Joseph S. Horrigan
JOSEPH S. HORRIGAN
State Bar No. 10012000
1000 Two Houston Center
909 Fannin
Houston, Texas 77010
713\659-4200
FAX: 713\659-3804

CO-COUNSEL FOR JOELLEN SNOW
PERMANENT GUARDIAN OF THE
PERSON AND ESTATE OF GLADYS
NELKIN, NCM

APPENDIX M

0530292 663-38-1341
NO 237,361

IN THE MATTER OF	)(	IN THE PROBATE
THE ESTATE OF	)(	COURT NO FOUR (4)
GLADYS NELKIN	)(	OF HARRIS COUNTY,
N.C.M.	)(	TEXAS

PANZER'S MOTION TO TAKE NOTICE OF RECENT SUPREME COURT DECISIONS APPLICATION TO THE *JURY VOIR DIRE AND SELECTION*

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now IDA PANZER and files this her Motion for the Court to take notice of two recent Supreme Court decisions:

1. *Edmonson v. Leesville Concreta Co., Inc.*, 111 S.Ct. 2077 (June 3, 1991); 2. *Powers v. Palacios*, D-0371 Vol 34 Texas Supreme Court Journal.[1] Copies of both opinions are attached hereto.

Respectfully submitted,

/s/
NEWTON B. SCHWARTZ
ATTORNEY FOR IDA PANZER
#325 723 Main
Houston, Texas 77002
2244161 SBT # 17869000

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[1] at pp 639,651 (June 12, 1991)

cc Mrs Lee Read
cc Ms Joellen Snow
cc Mr Joseph Horrigan
cc Hon Anita Rodeheaver, Probate Clerk
cc client

NOTICE OF HEARING

A hearing on Panzer's Motion to comply with the foregoing cases in the jury voir dire and selection process will be set for 9:00 a.m. Monday August 26, 1991 before the Hon William McCulloch, Presiding Judge, 5th floor Family Law center Building, or as soon thereafter as the same may be heard, prior to the jury voir dire.

/s/
NEWTON B. SCHWARTZ

APPENDIX N

0577246
NO. 237,361

664-22-0521
PROBATE COURT 4

IN THE MATTER OF	)(	IN THE PROBATE
THE ESTATE	)(	COURT NO FOUR (4)
OF GLADYS NELKIN	)(	HARRIS COUNTY,
N.C.M.	)(	TEXAS

IDA PANZER'S OBJECTIONS TO
ORDER GRANTING
MOTION FOR MISTRIAL & MOTION TO EXPUNGE[1]

TO THE HONORABLE JUDGE OF SAID COURT;

Comes now Ida Panzer through her counsel and files this her Objections as to form and substance (reserving all others as to substance) to the Order first received on Saturday August 31, 1991 by U.S. mail as per attached EX "A" (postmarked August 30, 1991). As is set forth more fully in Panzer's Response to Snow's "First Supplemental Motion for Sanctions" received by messenger delivery on August 29, 1991 at 1:10 p.m. and by FAX that same day, and/or in Panzer's Second Motion to Disqualify the Hon. William McCulloch,[2] which are incorporated by reference herein for

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[1] This Motion seeks, inter alia, to expunge all improper and incorrect and unsupported Findings of Fact and/or Conclusions of Law in said Order Granting Motion for Mistrial for reasons stated. See fn/1 at p. 5 citing *Cooter & Gell v. Hartmax Corp.*, 110 S.Ct. 2447, 2456 (1990) holding under Rule 11, F.R.CIV. P. that an independent and separate proceeding at law must be held to determine whether the attorney has abused the judicial process or not.

[2] Which cannot be filed under Rule 18a T.R.CIV. P. unless and until after a hearing on Snow's above Supplemental Motion for Sanctions. If trial is set immediately thereafter, as is impiled or within 10 days, it

all purposes as if again set forth verbatim herein,:

1. Said Findings of Fact and/or conclusion of Law set forth in said Order were not announced in Open Court (except that the mistrial was being granted). This was late in the afternoon of Thursday August 29, 1991 and was the first notice to Panzer and her counsel that the action was being taken. Motion for mistrial were made by both Newton B. Schwartz and Joseph Horrigan in open Court during the jury voir dire on August 28 and 29, 1991 in the Courtroom of Probate Court #4 in Houston, Texas.

2. Said proposed or Findings of Fact and/or Conclusions of Law were not otherwise shown to Mr. Schwartz as counsel for his client Mrs. Panzer at any time prior to their entry for approval as to either Form or Substance at any time prior to their being presented for entry by messenger on August 30, 1991 (Ex "A" attached hereto and made a part hereof for all purposes), to Brenda Keller, Coordinator. None was faxed to or delivered to Mr. Schwartz' office, nor was Schwartz otherwise notified thereof.

3. Said findings of fact and recitals therein are not supported by any evidence, or in the alternative, any competent evidence;

4. Said findings and recitations (being numbered #1-4 inclusively) are so against the great weight and preponderance of the evidence as to be insupportable; and

5. Said conclusions of law in #1-4 inclusively and in the Order portion itself are contrary to law and not a basis for the granting of a mistrial and an abuse of discretion in doing so.

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could not be filed until the conclusion of said trial if at all.

6. Said Findings and conclusions are vague and nonspecific and do not apprise counsel or the client (without the aid of a transcript or Statement of Facts of such proceedings on August 28, 1991 which has not yet been prepared to Mr. Schwartz' knowledge) of what "matters otherwise inadmissable in evidence" are referred to (#2); or how or wherein counsel "repeatedly exceeded the bounds of proper voir dire examination" (#1), or what "statements made and questions asked by Newton B. Schwartz were desired to instill in the jury prejudice against Joellen Snow" (#3) bir wgat "Statements made and questions asked by Newton B. Schwartz were so prejudicial to Joellen Snow that they could not be cured by instructions from the Court." (#4). An order for such transcript of Statement of Facts is being made on Tuesday Sept. 3, 1991; in fact a standing order to the official Court reporter has been made to furnish Mr. Schwartz with a copy of everything ordered by any other party or the Court. A credit balance exists in the overpayment of said Court reporter from a prior order in this case and an offer of either cash or check has been made for all such requests and orders.

7. Although the Court did state in the Courtroom late in the evening of Wednesday August 28 1991 that he had another "unrelated" matter to discuss with Mr. Joseph Horrigan, an evidentiary hearing is requested as to the subject and scope of such ex parte conference to inquire as to whether or not any matters involving this case or in particular either the request to prepare or any matter contained in "Joellen Snow's First Supplemental Motion for Sanctions" filed on August 29, 1991 or either the Motion for Mistrial or Order granting it or that Snow's Motion for Mistrial would be granted/ has been discussed ex parte with the Court. As set forth below such hearing is requested on Tuesday Sept. 3, 1991 at 9:30 a.m. or as soon thereafter as the Court may hear the same after due notice to Mr.

Horrigan and Mrs. Snow, who are being notified of this Motion by FAX to their respective offices. The Second Motion to Disqualify Hon William McCulloch and Panzer's Response to Snow's "First Supplemental Motion for Sanctions" referred to at p. 1 hereof are not attached, because they are not yet completed. They will be served, it is anticipated, before the hearings scheduled on Tuesday Sept. 3, 1991 above.

Respectfully submitted,

/s/_____
NEWTON B. SCHWARTZ, SR.
SCHWARTZ BERGER & VALDEZ P.C.
#325 723 Main
Houston, Texas 77002
2244161 SBT# 17869000

CERTIFICATE OF SERVICE

A true copy of the foregoing Objections to Order granting Mistrial and Request for Oral hearing thereon was served upon opposing counsel by U.S. mail first class postage prepaid on this 31st day of August, 1991 and also by FAX as set forth below. for the hearing with be withdrawn on Sept. 3, 1991, in Open Court.

An objection by FAX and mail were received after 7:00 p.m. Saturday night August 31, 1991; therefore hearing is set on or after Sept. 4, 1991 at 9:00 a.m. or as soon thereafter as the Court may order per Rule 21, T.R.CIV.P.

/s/_____
NEWTON B. SCHWARTZ

cc Horrigan & Goehrs FAX 6593804
1000 Two Houston Center
909 Fannin
Houston, Texas 77010-1003

cc Ms Joellen Snow
1148 Heights Blvd.
Houston, Texas 77008 FAX 8610852

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[1] As Mr. Joseph Horrigan himself properly advised the jury, circumstantial evidence is properly to be considered along with direct evidence. Among the "Appearances of Impropriety" is this incident done, admittely announced in Open Court, that 'another case or matter would be discussed by and between teh Court and Mr Horrigan and/or Ms Snow. That Statement is accepted on its face by Mrs Panzer's counsel Mr Schwartz but she is justifiably skeptical in the total circumstances and background of her case, the only one she has had or has in Court. She is entitled to go further into the incident and whether there have been any others ex parte. Only the persons involved, of course, would know either of their existence, if any, or who was present or the subject matter, if any, discussed.

Company *Cooter & Gell v. Hartmax Corp.*, 110 S.Ct. 2447, 2456 (1990), holding, inter alia, that a Motion under Rule 11 F.R.CIV. P. (which Snows' counsel urges is comparable to Rule 13 T. R. CIV. P.) is a separate and independent proceeding at law which requires the Court to determine whether the attorney abused the judicial process.

Further no Findings of Fact or Conclusions of Law need be made under Rule 215 before imposing discovery sanctions. *Transamerican Natural Gas Corp. v. Hon. William Powell, Judge* Vol 34 The Texas Supreme Court Journal 701, _____ S.W.2d _____ ((Tex Sup June 19 1991) (2p. 705 f.n. 9.

The Court did, however say as pertains to Ms Snow's alternate request here for the 'death penalty' i.e. striking all pleadings and defenses and in effect instructing a verdict for Snow and Horrigan:

The United States Supreme Court has recently, in interpreting Rule 11, F.P.Civ. P. which has been used as an analagous Rule to Rule 13 T.R.CIV. P., has aid in this connection that such Findings and Conclusions as are

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"...The District Court made no findings to support the sanctions imposed. Rule 215 does not require a trial court to make findings before imposing *discovery sanctions*, and we do not add such a requirement here. We note only that we do not have the benefit of any explanation by the district court for the severity of its ruling. It would obviously be helpful for appellate review of sanctions, especially when severe, to have the benefit of the trial court's findings concerning the conduct which it considered to merit sanctions, and we commend this practice to our trial courts. See *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866, 882-883 (5th Cir. 1989). Precisely to what extent findings should be required before sanctions can be imposed, however, we leave for further deliberations in the process of amending the rules of procedure.". (emphasis added) 34 Tex Sup Ct Journal at pp 705-706.

Additionally, the conclusory Findings purported to be made here, regardless of by whom prepared, are the Courts and are further deficient in that their lack of specificity:

1. would not support a plea of res judicata or a claim of estoppel as to later alleged misconduct or sanctionable conduct and could not be plead in bar at a subsequent hearing or proceeding and'or

2. Do not apprise Mrs Panzer or her counsel of what specifically they or either of them is charged with doing or having failed to do factually. They are merely conclusory, vague and general and do not set forth specific facts or events or any reference to any source from which such specifics can be obtained of gleaned. They are and would be a denial of both procedural and substantive 'due process of law' and imposition of any sanctions on this record would be neither appropriate or just within Rule 215.3

NEWTON B. SCHWARTZ
/s/
CC To all counsel certified above
cc Hon Anita Rodeheaver

included here in Order Granting Mistrial which Panzer and Schwartz, complain of:

"...gave the (U.S.) District Court the necessary flexibility to resolve questions involving 'multifarious, fleeting, special *narrow facts that utterly resist generalization*' (citing *Pierce v. Underwood*, 487 U.S. 552, 108 S.Ct. 2541 Id at 561-562, 108 S.Ct. at 2548...under all the circumstances involves the consideration of *unique factors that are "little susceptible... of useful generalization."* (emphasis added)

Cooter & Gell v. Hartmarx Corp., 110 S.Ct. 2447 (1990)

Such observations and holdings are equally applicable here.

/s/
NBS

APPENDIX O

0551671 665-27-1467

NO. 237,361

IN THE MATTER OF	)(	IN THE PROBATE
THE ESTATE	)(	COURT NO. FOUR (4)
	)(	
OF GLADYS NELKIN	)(	HARRIS COUNTY,
N.C.M.	)(	TEXAS

FIRST
REQUEST FOR FINFINGS OF FACT AND CONCLUSIONS OF LAW INCLUDING OMITTED FINDINGS UPON WHICH ORDER FOR SEVERAMCE AND ORDER IMPOSING SANCTIONS PER RULE 296 **ET SEQ. T.R.CIV. P. (FINAL JUDGMENTS).**

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now IDA PANZER, in all of her capacities herein, NEWTON B. SCHWARTZ, NEWTON B. SCHWARTZ P.C. and SWARTZ, BERGER & VALDEZ, P.C. and request the Court, pursuant to Rules 296 et seq T.R.CIV. P. to make Findings of Fact and Conclusions of Law upon which the Court based its Orders for Severance, Granting Joellen Snow's Motion for Summary Judgment and making it a Final Judgment and Order Imposing Sanctions against all the above Movants* herein ("MOVANTS") AS Ida Panzer, Newton B. Schwartz, Newton B. Schwartz P.C. and Schwartz Berger & Valdez P.C. are all collectively called hereinafter), all Such Orders and Final Judgments, all signed on September 23, 1991. Said Findings of Fact and Conclusions of law shall be stated separately and filed within

* except Schwartz, Berger & Valdez P.C. ("SB&V")

the time limits of Rules 296 T.R.CIV. P. and served upon counsel for and Movants and/or be made available to movants by service or notice of filing to enable them to timely obtain copies thereof for use in their appeals from such above specified Orders of September 23, 1991. Said Findings of Fact and Conclusions of law shall be stated separately and filed within the time limits of Rules 296 T.R.CIV. P. and served upon counsel for and Movants and/or be made available to movants by service or notice of filing to enable them to timely obtain copies thereof for use in their appeals from said above specified Orders of September 23, 1991.

II

Additionally, "MOVANTS" request the Court to Make Specific Findings of Fact and Conclusions of Law per rule 296 et seq. T.R.CIV. P. with respect to the following unspecified "following Findings" made by this Court in its Order For Severance and Order (Judgements) imposing Sanctions signed September 23, 1991:

I. "2. That numerous **papers** filed in this cause by Respondent IDA PANZER, **including but not limited to** the following, contain **statements** which Respondents ("MOVANTS") Newton B. Schwartz P.C.. Newton B. Schwartz and Ida Panzer **knew to be brought in bad faith, groundless and brought for the purpose of harassment**...." (emphases all added)

Order for Severance and Order Imposing Sanctions (Judgments made Final herein) signed September 23, 1991 by this Court at p. 3 (Par. 2)

II.[3]
"...4. That **such papers** were signed **in violation of Rule 13** of the Texas Rules of Civil Procedure ..." (Id at p.9 Par 4)

III.
"15. That the **sanctionable conduct described above** is **representative** of a plan, pattern **or** course of sanctionable conduct which includes **but is not limited to: (a) the documents expressly set forth above**: (b) **numerous misstatements** as to the **law** to this Court by Respondent Newton B. Schwartz; **numerous misrepresentations** as to the **facts** by Respondent Newton B. Schwartz. and (d) the **conduct and statements** by Respondent Newton B. Schwartz **during the voir dire examination of the panel of potential jurors** which resulted in this Court's granting Joellen Snow's **Motion for a Mistrial**...." (Orders and Judgments at pp11-12 - Paragraph 15.

IV."... the Court considered, **among other things**, the following: (Orders and Judgments of September 23, 1991 ante at p. 12 par 1) ("in its consideration of the matter of severing and making the subject of a separate proceeding the claims and causes of action heretofore filed in this cause by Ida Panzer as well as Ida Panzer's opposition or objections to the accountings of Joellen Snow, referred to above, The Court considered among other things, the following ...: " Id at p. 12- par. 1

V. "That Respondents (Movants) have consistently engaged in **said course of sanctionable conduct** in this cause..." (Id at p. 12 par 16)

---

[3] II A :Such papers" constitute certificates by them that they have read "such papers" ... (Id at p 8 Par3)

VI. "That **said course of sanctionable conduct** has resulted in **additional. unreasonable burdens** on the Court system, **including** this Court's time and court costs..." (Id at p. 12 par. 17)

VII. "It is further ORDERED, ADJUDGED and DECREED that this Order **Imposing Sanctions against Ida Panzer, Newton B. Schwartz P.C. and Newton B. Schwartz is hereby made a Final Judgment** in that it disposes of all issues between Ida Panzer and Joellen Snow, Permanent Guardian of the Person and Estate of Gladys Nelkin n.c.m. in this cause ... It is further ORDERED, ADJUDGED and DECREED that all matters relating to this issues resolved through **this Order Imposing Sanctions** be . and the same hereby are severed from this proceeding and made the subject of a separate action:

It is further further ORDERED, ADJUDGED and DECREED that this Order for Severance and **Order Imposing Sanctions is a final appealable Judgment.**

SIGNED this 23rd day of September, 1991.
(Id at p. 14)

/s/ WILLIAM C. MCCULLOCH
JUDGE PRESIDING "

III.

If such Findings of 'Fact' and Conclusions of Law were pleaded they would be clearly subject to valid Special Exceptions. They are no less vulnewable here because they are signed under the aegis of the Court although prepared by JSH (Joseph S. Horrigan) as indicated on each page thereof "MHJSH/107."

In order to enable Movants to prepare their appeals and to enable the Appellate Courts to determine the propriety, correctness or erroneousness, abuse of discretion and other specifics, such vague, global, conclusory and general findings do not enable either to do any of their assigned tasks and goals under the Texas Rules of Civil Procedure. These specifics have been sought before at every and the earliest opportunity to do so, to no avail. This is the last opportunity for Movants and the Court and Co counsel Mr. Horrigan to state **all** of the "numerous papers" "sanctionable conduct", "numerous mistatements as to the law" (only one was specified (Id at p.8, par h and it, like all others are and were objected to as being correct statements, as both to law and facts); "the conduct and statements during voir dire", "course of sanctionable conduct has resulted in additional unreasonable burdens" [2] set forth above. Movants do not know any more now after having Ida Panzer's pleadings erroneously stricken, itself a deprivation of federal due process of law,[1] without ever having been notified or advised of what is claimed to be violative or sanctionable, although requested and demanded in prior pleadings, all of which have now be struck by the court.

Rather than have an appellate court reverse and remand for such Findings of Fact and Conclusions of law, Movants request that they be made now, if any exist or are claimed to exist or have existed on this record which is being brought forward on appeal in its entirety both as to Transcript and Statement of Facts. Every word, every paper, every thing will be before the Court of Appeals and

---

[2] and including alleged but unspecified "misrepresentations as to the facts.

[1] *Societe' Internationale Pour et al v. Rogers* 357 U.S. 197, 209 (1958)

Supreme Court except what **other** unspecified, unnamed 'papers, course of sanctionable conduct including alleged jury voir dire 'etc. Now is the time. Now is the place. It is required by Rules 296 et sew, far beyond the vague, repeated generalized conclusions again set forth here under the aegis of Court orders and Judgments as in his and Mrs Snows prior pleadings.

WHEREFORE, Movants Panzer, Schwartz, and the professional corporations request, i.e. demand that such specific Findings of Fact and Conclusions of Law be made timely and fully to enable Movants, all Appellants, to perfect their appeals timely and fully in order to enable the appellate courts to know on what specific facts this Court reached its erroneous Conclusions of Law. That is one reason it is being filed the very next day after the signing of the Orders and Judgments of September 23, 1991.

Respectfully submitted,

/s/

NEWTON B. SCHWARTZ pro se
& ATTORNEY FORIDA PANZER
NEWTON B. SCHWARTZ P.C. &
SCHWARTZ, BERGER & VALDEZ P.C.
#325 723 Main
Houston, Texas 77002
2244161 SET#1786900

CERTIFICATE OF SERVICE

A true copy of the foregoing was served upon all counsel by U.S. Mail CRR first class postage prepaid on this 24th day of Sept. 1991
cc CRR# PO57206794
Joseph Horrigan

1000 Two Houston Center
909 Fannin
Houston, Texas 77010

cc CRR# PO57206795
Joellen Snow
Snow & Whitworth
1148 Heights Blvd
Houston Texas 77008-6916

cc CRR# PO57206796
Lee Read
2120 Travis
Houston, Texas 77002

cc. Original Hand Delivery
Hon Anita Rodeheaver
Probate Clerk
5th floor Family Law Center
Houston, Texas 77002

cc Court Unit of Hon
William McCulloch
5th floor Family Law Center Hand delivery
Houston, Texas 77002

cc Ida & Irving Panzer

/s/
NEWTON B. SCHWARTZ

0551672 665-27-1473

NO 237,361

GUARDIANSHIP OF	)(	IN THE PROBATE
	)(	COURT NO FOUR (4)
GLADYS NELKIN	)(	HARRIS COUNTY,
N.C.M.	)(	TEXAS

FIRST REQUEST FOR FINDINGS OF FACT AND **CONCLUSIONS OF LAW**

TO THE HONORABLE JUDGE OF SAID COURT:

Come now Movants IDA PANZER, NEWTON B. SCHWARTZ, NEWTON B. SCHEARTZ, P.C. and SCHWARTZ, BERGER & VALDEZ P.C. and move the Court pursuant to Rules 296 et seq T.R.CIV. P. to make separate and full Findings of Fact and Conclusions of law in regard to its Orders "approving Account for Final Settlement of Temporary Guardianship" and Order Approving Fist Amended Account for Final Settlement of Permanent Guardianship both signed on September 23, 1991..

Respectfully submitted,

/s/_____
NEWTON B. SCHWARTZ pro se &
ATTORNEY FOR IDA PANZER
NEWTON B. SCHWARTZ P.C. and
SCHWARTS, BERGER & VALDEZ P.C.

cc Joseph Horrigan CRR
cc Joellen Snow Crr
cc Lee Read CRR
cc Hon Anita Rodeheaver - hand delivery
cc Court unit of Hon Wm McCulloch hand delivery
cc Mr & Mrs Irving D. Panzer

Supreme Court, U.S.
FILED
AUG 23 1996
CLERK

(2)

No. 96-5

In The

Supreme Court of the United States

October Term, 1995

IDA NELKIN PANZER AND
NEWTON B. SCHWARTZ,

Petitioners,

v.

BEA NELKIN, JOELLEN SNOW,
AND JOHN HUTCHINSON,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The First Judicial District Of Texas At Houston

BRIEF OF RESPONDENT JOELLEN SNOW IN OPPOSITION

JOSEPH S. HORRIGAN
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Counsel for Respondent Joellen Snow

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OR CALL COLLECT (402) 342-2831

22 pp

QUESTIONS PRESENTED FOR REVIEW

A. WHETHER THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION TO REVIEW THE JUDGMENTS OF A TEXAS COURT OF APPEALS AND THE SUPREME COURT OF TEXAS IN THIS CASE BY WRIT OF CERTIORARI, IT BEING RESPONDENT'S POSITION THAT NO FEDERAL QUESTION IS INVOLVED IN THIS CASE?

B. ASSUMING THIS COURT'S JURISDICTION, WHETHER THE TRIAL COURT'S REFERENCE (DURING THE COURT'S OPENING STATEMENTS TO PROSPECTIVE JURORS) TO JURY TRIALS DATING BACK "TO THE TIME OF CHRIST", AND A REFERENCE BY RESPONDENT SNOW'S COUNSEL TO "SEVEN ACRES JEWISH GERIATRIC CENTER" DURING VOIR DIRE VIOLATED THE FIRST AMENDMENT RIGHTS OF THE PETITIONERS, WHO ARE JEWISH?

C. ASSUMING JURISDICTION, WHETHER THE DRAFTING BY RESPONDENT SNOW'S COUNSEL OF THE FINDINGS OF FACT AND CONCLUSIONS OF LAW SIGNED BY THE TRIAL JUDGE DENIED PETITIONERS DUE PROCESS OF LAW?

D. ASSUMING JURISDICTION, WHETHER THE STRIKING OF TWO PROSPECTIVE JURORS BY RESPONDENT'S COUNSEL IN EXERCISING PEREMPTORY CHALLENGES VIOLATED PETITIONER PANZER'S RIGHT TO A FAIR AND IMPARTIAL JURY OF HER PEERS?

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I.

MISSTATEMENTS OF FACT BY PETITIONERS

In their Petition for a Writ of Certiorari, the Petitioners make misstatements of fact which should be called to the attention of the Court. Such misstatements of fact include the following:

1. Petitioners state that "Respondent's Counsel admittedly 'ghostwrote' Findings of Fact, Conclusions of Law, Orders and Judgments." (Petition, Pg. 4). Respondent Snow will stipulate (and has stipulated below) that the typewritten pages which constitute the Findings of Fact and Conclusions of Law by the trial court were typed in the office of Joseph S. Horrigan, Respondent Snow's counsel of record. Respondent Snow will *not* stipulate, and emphatically denies, that the Findings of Fact and Conclusions of Law rendered by the trial court were "ghostwritten" by her counsel, which implies that the trial court did not exercise independent thought.

2. Petitioners, in referring to the Findings of Fact of the trial court, state: "In the case at bar the Findings were clearly erroneous and unsupported." (Petition, Pg. 12). On the contrary, the Court of Appeals' opinion states: "The trial court's findings of fact and conclusions of law are well supported by the record." (Petition, Appendix A, at Pg. 36a).

II.

RESPONDENT SNOW'S STATEMENT OF THE CASE

Respondent Snow adopts the factual statements set forth in the opinion of the court of appeals, set forth in Appendix A to the Petition, as her own statement of the case.

III.

REASONS FOR DENYING THE WRIT

A. NO SUBSTANTIAL FEDERAL QUESTION IS INVOLVED IN THIS CASE AND, ACCORDINGLY, THIS COURT'S JURISDICTION CANNOT BE INVOKED UNDER 28 U.S.C. § 1257.

B. THE FIRST AMENDMENT RIGHTS OF THE PETITIONERS, WHO ARE JEWISH, WERE NOT VIOLATED BY THE INNOCUOUS REFERENCE OF THE TRIAL COURT TO JURY TRIALS DATING BACK "TO THE TIME OF CHRIST" NOR BY A REFERENCE BY RESPONDENT SNOW'S COUNSEL DURING VOIR DIRE TO "SEVEN ACRES JEWISH GERIATRIC CENTER", WHICH IS THE CORRECT NAME OF THE NURSING HOME WHERE GLADYS NELKIN RESIDED.

C. PETITIONERS WERE NOT DENIED DUE PROCESS OF LAW BY THE DRAFTING BY RESPONDENT SNOW'S COUNSEL OF THE FINDINGS OF FACT AND CONCLUSIONS OF LAW SIGNED BY THE TRIAL JUDGE.

D. THE STRIKING OF TWO MINORITY PROSPECTIVE JURORS BY RESPONDENT SNOW'S COUNSEL IN EXERCISING PEREMPTORY CHALLENGES DID NOT DENY PETITIONER PANZER HER RIGHT TO A FAIR AND IMPARTIAL JURY OF HER PEERS.

IV.

ARGUMENTS AND AUTHORITIES

A. NO SUBSTANTIAL FEDERAL QUESTION IS INVOLVED IN THIS CASE AND, ACCORDINGLY, THIS COURT'S JURISDICTION CANNOT BE INVOKED UNDER 28 U.S.C. § 1257.

This is a controversy which turns purely on questions of Texas law, none of which involve any issue arising under the Federal Constitution, regardless of Petitioners' efforts to convince this Court to the contrary.

The real questions before the state courts below, insofar as they are germane to Petitioners' contentions that issues arising under the U.S. Constitution are involved, were as follows:

1. Whether Petitioners' complaints about statements of the trial judge and statements by opposing counsel during voir dire of the jury were rendered moot when Respondent Snow's motion for mistrial (based upon conduct by Petitioners during voir dire) was granted?

2. Whether Petitioner Panzer properly preserved her complaints upon constitutional grounds in the courts below, when the only petitioner to raise such complaints in the Texas Court of Appeals and the Supreme Court of Texas was Petitioner Schwartz, who was Petitioner Panzer's attorney in the trial court?

3. Whether Petitioners met their burden of proof at the evidentiary hearing conducted by the trial court on Petitioners' complaint that counsel for Respondent Snow had struck minority prospective jurors for racially motivated reasons?

4. Whether Petitioners waived any complaints concerning the Findings of Fact and Conclusions of Law entered by the trial court, by failing to submit specific, proposed Findings of Fact and Conclusions of Law themselves?

5. Whether the Findings of Fact and Conclusions of Law signed by the trial court are supported by the evidence?

Each of the five (5) questions enumerated above was expressly dealt with by the Texas appellate courts, and each question was resolved in favor of Respondent Snow. A brief summary of the disposition of these issues is as follows:

1. **Statements During Voir Dire**. In its opinion, the Court of Appeals expressly addressed Petitioners' contentions concerning statements to the jury panel during voir dire by the trial judge and counsel for Respondent Snow, with this holding:

> "Schwartz's assertions that the trial judge and Horrigan attempted to 'poison' the jury panel against Panzer and that Horrigan struck two jurors for racially-motivated reasons are not supported by the record. Even if the record supported these allegations, however, there would be no reversible error. The trial judge denied Schwartz's motion for a mistrial, but *granted* Horrigan's motion for a mistrial. The relief appellants sought was granted. We cannot see how appellants could possibly be harmed by the trial court's action." (Petition, Appendix A, at Pg. 26a).

2. **No Preservation of Constitutional Complaints**. Likewise, the Court of Appeals held that Petitioner

Schwartz (who was the only Petitioner to challenge statements during voir dire when an appeal was taken) did not have standing to raise that issue, with this language:

> "We further agree with Snow that Schwartz has no standing to raise this issue. He was not a party to the litigation; only Panzer was in a position to be affected by the trial court's rulings on these matters. We overrule Schwartz's third and fourth points of error." (Petition, Appendix A, at Pg. 26a).

3. **Burden of Proof – Striking Minority Jurors.** When Petitioners took the position in the trial court that two prospective jurors had been improperly struck by counsel for Respondent Snow in exercising peremptory challenges, the trial court conducted an evidentiary hearing. An excerpt from that hearing appears as Appendix I to the Petition, at Pages 68a through 83a. The only testimony at that hearing was the testimony of Mr. Horrigan, counsel for Respondent Snow, who testified that his reasons for striking the two prospective jurors in question were: (a) the relatively low socio-economic status of one juror; and (b) an unpleasant experience which the other juror had in the past with an attorney. Based upon that evidence, the trial court held that the strikes were not race-related. (Petition, Appendix I at Pages 81a through 83a). No evidence was offered to the contrary.

4. **Waiver Concerning Findings of Fact and Conclusions of Law.** The law in Texas is clear that, in order to preserve error on appeal concerning Findings of Fact and Conclusions of Law by the trial court, a party must file a request for "*specified* additional or amended findings or conclusions." (Tex. R. Civ. P. 298, emphasis added). After

the trial court signed the Findings of Fact and Conclusions of Law in this case, Petitioners filed a document entitled "First Request for Findings of Fact and Conclusions of Law . . . ", which appears as Appendix O to the Petition, at Page 106a. Nowhere in this so-called "Request" did the Petitioners set forth any proposed specific findings or conclusions that they wished the trial court to make, thus rendering their "Request" fatally defective under Texas procedural rules. Under Texas case law, additional findings and conclusions are required to be made only when they relate to ultimate or controlling issues. *Texas Eastern Transmission Corp. v. Sealy Ind. School District*, 572 S.W.2d 49, 51 (Tex. Civ. App. – Houston [1st Dist.] 1978, no writ). Texas law is also clear that requested findings and conclusions which do no more than request explanations of the court's ruling in the case need not be considered by the trial court. *Dura-Stilts Co. v. Zachry*, 697 S.W.2d 658 (Tex. App. – Houston [1st Dist.] 1985, writ ref'd n.r.e.); *Crain v. Southern Warehouse Corp.*, 612 S.W.2d 283, 284 (Tex. Civ. App. – Houston [14th Dist.] 1981, no writ).

5. **Findings and Conclusions Supported by the Evidence**. The Findings of Fact and Conclusions of Law made by the trial court are set forth in their entirety in the Opinion of the Court of Appeals (Petition, Appendix A, at Pages 27a through 35a). Such findings and conclusions are absolutely devastating to Petitioners' position, and conclusively demonstrate why death penalty sanctions were imposed in this case. The Court of Appeals' holding with respect to such findings and conclusions was that the "trial court's findings of fact and conclusions

of law are well supported by the record." (Petition, Appendix A, at Pg. 36a).

Rule 10 of the Rules of this Court sets forth the standard for review concerning the Petition in the instant case: "A Petition for a Writ of Certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

There being no substantial federal question before this Court, Respondent Snow respectfully moves that the Petition be dismissed, on the ground that this Court has no jurisdiction with respect to the matters raised therein.

B. THE FIRST AMENDMENT RIGHTS OF THE PETITIONERS, WHO ARE JEWISH, WERE NOT VIOLATED BY THE INNOCUOUS REFERENCE OF THE TRIAL COURT TO JURY TRIALS DATING BACK "TO THE TIME OF CHRIST" NOR BY A REFERENCE BY RESPONDENT SNOW'S COUNSEL DURING VOIR DIRE TO "SEVEN ACRES JEWISH GERIATRIC CENTER", WHICH IS THE CORRECT NAME OF THE NURSING HOME WHERE GLADYS NELKIN RESIDED.

The complete statement of the trial judge about which Petitioners complain was made to the general panel of prospective jurors at the commencement of voir dire, and was as follows:

> "Good morning. I am Judge Bill McCulloch, Judge of Probate Court Number 4 of Harris County. Today we are here to try a lawsuit involving an Estate. The parties have requested a jury trial and that is why you are here.

> "The right to a trial by jury of impartial peers is inherent in our system of justice. It is my understanding that jury trials date clear back to the time of Christ. In fact, in early Greece juries consisted of 201 people and to qualify for a jury you had to be at least 60 years of age." (Petition, Appendix G, Pg. 65a).

The statement to the general panel of prospective jurors by Mr. Horrigan, counsel for Respondent Snow, about which Petitioners complain, is as follows:

> "Mrs. Nelkin resided in her final days in a geriatric center here in Houston, called the Seven Acres Jewish Geriatric Center. Does that ring any bells? Has anybody ever had any personal experience with Seven Acres; any friends or relatives either working there or spent time there or lived there?" (Petition, Appendix H, Pg. 66a).

Pursuant to a Motion in Limine filed prior to trial by Petitioners, the trial judge had ruled that no reference should be made to the fact that Petitioner Panzer and her husband and Petitioner Schwartz were Jewish. *It is undisputed that the correct name of the nursing home where Gladys Nelkin resided was: "Seven Acres Jewish Geriatric Center." There is no evidence in the record that the residents of Seven Acres Jewish Geriatric Center were all Jewish.*

Aside from the fact that Snow's Motion for Mistrial concerning Petitioners' conduct during voir dire was granted, thus rendering their complaint on this point moot, it is perfectly obvious that the contention of Petitioners that the general jury panel was "poisoned" by the above innocuous remarks is totally frivolous and without merit. The trial judge's comments, which reference not only the "time of Christ" but jury trials in ancient Greece,

could not have been more harmless. One need only remember that this year is 1996 *A.D.* (as opposed to *B.C.)* to recognize that "the time of Christ" has historical significance separate and apart from religious beliefs.

With regard to counsel's reference to the "Seven Acres Jewish Geriatric Center", Appendix H to the Petition sets forth the reason why it was necessary to mention the name of the nursing home in question. After Petitioner Schwartz objected and moved for a mistrial, counsel for Respondent Snow stated:

> "Your Honor, I can't take away the name of the organization. I believe the Court's rule [ruling] was that I would make no reference to the fact that Mrs. Panzer is Jewish, and I do not intend to make any reference to that.
>
> "But we have witnesses coming in from that very institution, who work there. They have to identify themselves. They have got to say where they work. They can't lie." (Petition, Appendix H, Pg. 67a).

Petitioners' argument on this point is tantamount to a contention that references to "Southern Methodist University" or to "Methodist Hospital of Houston" in a voir dire examination must necessarily mean: (a) that all students at Southern Methodist University are Methodists; or (b) that all patients at Methodist Hospital are Methodists, thereby somehow prejudicing a party to a lawsuit who does not wish to be identified as a Methodist. That is absurd.

C. PETITIONERS WERE NOT DENIED DUE PROCESS OF LAW BY THE DRAFTING BY RESPONDENT SNOW'S COUNSEL OF THE FINDINGS OF FACT AND CONCLUSIONS OF LAW SIGNED BY THE TRIAL JUDGE.

In the instant case, the Findings of Fact and Conclusions of Law were signed by the trial judge on October 11, 1991. Thereafter, Petitioner filed a document on October 16, 1991, purporting to request additional and/or amended Findings of Fact and Conclusions of Law. The trial court obviously gave due consideration to the request by the Petitioner for additional Findings and Conclusions. On December 10, 1991, the trial judge signed its "Order Denying Request for Additional and/or Amended Findings of Fact and Conclusions of Law", in which it expressly found that the Request filed by the Petitioners was "a request for an explanation of why the court ruled as it did and thus not a proper request under Rule 298 [Tex. R. Civ. P.] for additional findings and conclusions on a point relating to an ultimate issue or controlling issue in the case" [Citing *Dura-Stilts Co. v. Zachry*, supra]. A copy of the Court's Order of December 10, 1991 is included herein as Respondent's Appendix 1. Neither Respondent Snow nor her counsel had anything whatsoever to do with the preparation of that Order.

Texas law has never deviated from the proposition that it is not reversible error for a trial court to delegate the drafting of its findings and conclusions to an attorney in the case. *Berkman v. D.M. Oberman Mfg.*, 230 S.W. 838, 840-841 (Tex. Civ. App. – Austin 1921, writ dism'd); *First Nat'l Bank v. Skidmore*, 30 S.W. 564, 566 (Tex. Civ. App. 1895, no writ).

The only cases cited by Petitioners in urging a due process violation are *Anderson v. Bessemer City*, 470 U.S. 564 (1984), and *In Re: Colony Square*, 819 F.2d 272 (11th Cir. 1987). Even the Petitioners concede that *Anderson v. Bessemer City*, supra, does not support their position. That case recognized the rule that "even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous." Id. at 572. The same rule was acknowledged by the court in the *Colony Square* case, supra, where the court concluded that the trial judge "did not abdicate his adjudicative role", and cited *Anderson v. City of Bessemer*, supra. Id. at 276. See also *In Re: Wolverton Assoc.*, 909 F.2d 1286, 1292 (9th Cir. 1990). The Texas Court of Appeals in the instant case expressly held that the "trial court's findings of fact and conclusions of law are well supported by the record." (Petition, Appendix A, at page 36a). Thus, the "clearly erroneous" standard applied by the federal courts has been satisfied.

D. THE STRIKING OF TWO MINORITY PROSPECTIVE JURORS BY RESPONDENT SNOW'S COUNSEL IN EXERCISING PEREMPTORY CHALLENGES DID NOT DENY PETITIONER PANZER HER RIGHT TO A FAIR AND IMPARTIAL JURY OF HER PEERS.

As has been mentioned above, a mistrial was ordered by the trial court as a result of improper conduct on the part of Petitioners. Thus, while it was Respondent Snow's Motion for Mistrial that was granted, rather than the Petitioners' Motion, the Petitioners received the relief that they requested in contending that the peremptory strikes

by Respondent Snow's counsel were racially motivated. In the language of the Texas Court of Appeals, "[w]e cannot see how appellants [Petitioners] could possibly be harmed by the trial court's action." (Petition, Appendix A, at page 26a).

Petitioners' own sanctionable conduct was the sole cause of their case not being tried by a fair and impartial jury of their peers. This Court has expressly held that "death penalty" sanctions imposed by a trial court will not be disturbed on appeal in the absence of an abuse of discretion. *Nat'l Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976). The same rule prevails in Texas, and was applied in this case. *Transamerican Nat'l Gas Corp. v. Powell*, 811 S.W.2d 913 (Tex. 1991). The Court of Appeals addressed the issue with this language:

> "The trial judge determined that appellants [Petitioners] conducted this litigation in a manner that was apparently intended to protract the litigation and harass Snow. We cannot find that the trial court abused its discretion in striking Panzer's pleadings." (Petition, Appendix A, Pg. 36a).

CONCLUSION

Respondent Snow respectfully submits that this Court has no jurisdiction in this matter because no substantial federal question is involved, and moves for dismissal on that basis. In the alternative, she requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX I

No. 237,361

ESTATE OF	§	PROBATE COURT
GLADYS NELKIN	§	NUMBER FOUR
N.C.M.	§	HARRIS COUNTY, TEXAS

ORDER DENYING REQUEST FOR ADDITIONAL AND/OR AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

On the 24th day of September, 1991, Movants Ida Panzer, Newton B. Schwartz, Newton B. Schwartz, P. C. and Schwartz, Berger and Valdez P.C. ("Movants") filed two pleadings, one entitled "First Request for Findings of Fact and Conclusions of Law" and the other entitled "First Request for Findings of Fact and Conclusions of Law Including Omitted Findings upon Which Order for Severance and Order Imposing Sanctions per Rule 296 et seq T.R.Civ. P. (Final Judgments)". On October 11, 1991, this court signed its Findings of Fact and Conclusions of Law and provided all counsel with a copy of said findings.

On October 16, 1991, Movants, excluding Schwartz, Berger & Valdez P.C., filed "Ida Panzer et al Request for Additional and or Amended Findings of Fact and Conclusions of Law per Rule 298 T.R.Civ. P." asking for specific facts or specificity with regard to what Movants "have done wrong . . . or the reasons, singly or cumulative, for the Courts' actions" (sic). The court finds that this is a request for an explanation of why the court ruled as it did and thus not a proper request under Rule 298 for additional findings and conclusions on a point relating to an

ultimate or controlling issue in the case. See *Dura-Stilts Co. v. Zachry* (App. 1 Dist. 1985) ___697 S.W.2d 658, ref. n.r.e. Costs associated with this order are waived.

SIGNED THIS 10 day of December, 1991.

/s/ William C. McCulloch
JUDGE PRESIDING